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No. 97- OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

AT&T CORP.,

Petitioner,

v.

CENTRAL OFFICE TELEPHONE, INC.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in violation of the uniform holdings of this Court from *Chicago & Alton R.R.* v. *Kirby*, 225 U.S. 155 (1912), and *Davis* v. *Cornwell*, 264 U.S. 560 (1924), to *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990), and *MCI Telecommunications Corp.* v. *American Telephone & Telegraph Co.*, 512 U.S. 218 (1994), that a federally regulated carrier's filed tariff exclusively governs the legal relationship between customer and carrier and that those rights cannot be altered by the carrier's contract or tort, the Ninth Circuit improperly allowed state-law contract and tort claims based on a common carrier's failure to honor an alleged side agreement to give its customer better service than called for by the carrier's tariff?

LIST OF PARTIES AND AFFILIATES

The parties listed on the caption were the only parties to the proceedings below. American Telephone and Telegraph Co. has, since the inception of this case, changed its name to AT&T Corp.

Pursuant to Supreme Court Rule 29.1, AT&T Corp. declares that it has no parent. AT&T Corp. has an equity interest in the following publicly traded companies:

LIN Television Corporation;
American Mobile Satellite Corporation;
PriCellular, Inc.;
General Magic, Inc.;
Novell, Inc.;
Lanser Wireless Inc. (Canada); and
SmartTone Telecommunications Holdings Ltd. (Hong Kong).

AT&T Corp. owns an interest in the following non-publicly traded company, which has public debt outstanding:

AT&T Credit Holdings, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner AT&T Corp. hereby petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Appendix to Petition for Certiorari ("App.") 1a-30a) is reported at 108 F.3d 981. The order of the court of appeals denying AT&T Corp.'s petition for rehearing and suggestion for rehearing en banc (App. 49a) is unreported. The order of the United States District Court for the District of Oregon entering judgment on a jury verdict for Central Office Telephone, Inc. and dismissing AT&T Corp.'s counterclaims (App. 48a) is unreported. The decision and opinion of the district court amending its judgment (App. 31a-47a) is also unreported.

JURISDICTION

The order of the court of appeals denying AT&T's petition for rehearing was entered on July 18, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in this case are 47 U.S.C. §§ 201, 202, and 203, which are reproduced at App. 50a-53a.

STATEMENT OF THE CASE

In this case, a customer subscribed to receive a federally-tariffed telecommunications service from a common carrier. In accord with the Communications Act of 1934, the carrier's tariff set forth not only the "charges" for that service, but also the "classifications, practices, and regulations affecting such charges," including the terms under which the service would be "provisioned" (*i.e.*, the process of filling service orders) and billed. *See* 47 U.S.C. § 203(a). However, the customer then alleged the carrier's personnel had orally or impliedly promised it quicker provisioning, and different billing responsibilities, than those provided for in the tariff, and the customer sued the carrier under state law for breach of contract and tortious interference with contract when delays in provisioning and errors in billing occurred.

A divided Ninth Circuit panel held that such claims were properly submitted to the jury, and upheld a damages award based on them. The panel majority held that (1) "[b]ecause this case does not involve rates or rate-setting, but rather involves the provisioning of services and billing under several contracts, the filed-rate doctrine does not apply," and (2) the filed tariff doctrine in any event applies only to matters contained in the tariff, and does not prohibit side deals to supplement the tariff. App.

10a-11a. This holding is contrary to a century of uniform decisions of this Court (and other courts of appeals), and this Court has previously summarily reversed the Ninth Circuit for failing to follow these decisions. *See Thurston Motor Lines, Inc.* v. *Jordan K. Rand, Ltd.*, 460 U.S. 533 (1983). This Court should follow the same course here.

1. Petitioner AT&T is a "common carrier" within the meaning of the Communications Act of 1934 ("the Act"). 47 U.S.C. § 153(h). It therefore must file with the Federal Communications Commission "schedules" (known as tariffs) of its "charges" and "the classifications, practices, and regulations affecting such charges" for its long distance services. 47 U.S.C. § 203(a). It further must provide service under rates, regulations, and practices that are just and reasonable (47 U.S.C. § 201(b)), and is prohibited from engaging in discrimination among customers that is unjust or unreasonable. 47 U.S.C. § 202(a).

Software Defined Network ("SDN") is a tariffed long-distance service that is offered by AT&T to meet the needs of large corporate customers with offices in multiple locations. SDN establishes a long distance network to connect the different locations of a customer and enables it to call others as well. Setting up an SDN network is a complex undertaking, but once the network is established, SDN customers that make large volumes of calls will pay lower rates than those for some other AT&T long distance services. Once an SDN network is established, an SDN customer can place an order to add or drop locations on its network. Additionally, AT&T's tariff provides for several billing options for SDN customers, including one in which AT&T sends bills directly to the individual locations on the network, although the subscriber remains responsible for all payments.

Prior to 1989, the only customer locations that could be connected to SDN networks were those that originated large volumes of traffic. In 1989, AT&T revised its tariff to add a new service feature (switched access) that

made it economical to hook up locations that originated small volumes of traffic. This new service arrangement was complicated to install, and there were a number of ways in which billing errors might occur. AT&T had made this change in order to make SDN even more attractive to large corporations.

However, the addition of the new service arrangement also made SDN attractive to substantial numbers of "resellers," who buy long distance services at volume discounts, and resell the services to many small customers at a marked-up price, retaining as profits the difference between the discounted price paid to AT&T for the service and the higher price charged to its own customers. Because many resellers could obtain SDN at lower rates than WATS or other AT&T services, resellers inundated AT&T with an unexpectedly large number of orders first to establish SDN networks and then to add new locations (*i.e.*, as the resellers signed up new customers). AT&T did not then have the mechanisms to process and provision the large volume of switched access orders that came from non-resellers as well as resellers, so it took far longer to provision the SDN orders submitted in 1990 and 1991 than it had taken to provision SDN orders previously or than it did after 1992.

Courts and juries have, to date, found that AT&T's conduct in providing SDN to resellers in this 1990-1992 period did not violate AT&T's substantive duties under §201(b), § 202(a), or § 203 of the Act.[1]

2. Respondent Central Office Telephone ("COT") was one SDN reseller. It purchased SDN from AT&T and resold it to its own customers from 1990 to 1992. Upon subscribing for SDN, COT signed an order form stating that its service relationship with AT&T "WILL BE GOVERNED BY THE RATES AND TERMS

[1] *See US WATS, Inc.* v. *AT&T*, No. 93-CV-1038 (E.D. Pa. Dec. 15, 1995); *Teledesign* v. *AT&T*, No. H-92-1919 (S.D. Tex. Apr. 21, 1994).

AND CONDITIONS IN THE APPROPRIATE AT&T TARIFFS." Excerpts of Record ("ER") 4575.

The SDN tariff specifically defined AT&T's responsibilities in provisioning orders for service and in billing SDN service. When an order for new service is placed, the tariff requires AT&T to establish the "due date" for provisioning the order that AT&T believes to be realistic based on conditions when the order is received. *See* AT&T Tariff F.C.C. No. 1, § 2.5.10; App. 55a. The tariff then requires AT&T to "make every reasonable effort to assure" provisioning of services by this "due date," but provides that if AT&T fails to do so, it has an additional 45 days from that date, after which time the customer could cancel its order without penalty if the order has not been filled. *Id.* The tariff further provides that AT&T has no responsibility for the allocation of charges for SDN service between a reseller or other customers and the individual locations on its network (*i.e.*, the reseller's customers). *See* AT&T Tariff F.C.C. No. 1, § 6.2.4; App. 56a.

AT&T's tariff further defines its liabilities for violations of its tariffs. For "nonwillful" violations, AT&T's liability is limited to a proportionate share of the applicable service charges for the affected period. *See* AT&T Tariff F.C.C. No. 1, § 2.3.1.A.; App. 54a. For "willful misconduct", there is no limitation on AT&T's liability. *Id.*

COT sued AT&T on November 27, 1991 in the district court for Oregon with jurisdiction based on 28 U.S.C. § 1332. COT did not claim that AT&T had violated its tariffs and thus violated Section 203 of the Act. 47 U.S.C. § 203. Nor did COT's complaint claim that AT&T had engaged in "unjust" or "unreasonable" "practices" or "unreasonable discrimination," in violation of Sections 201(b) and 202(a) of the Act. 47 U.S.C. §§ 201(b), 202(a). Instead, COT pursued state-law claims for breach of contract and for tortious interference with COT's contracts with its customers. These claims all rested on the allegation that the agreement between COT and AT&T was not limited to the terms of the tariff, but

also "included all the understandings that COT's president had from reading service brochures and from talking with AT&T representatives." App. 6a. In particular, COT claimed that AT&T employees had made enforceable oral agreements to provision COT's orders within 30 to 45 days and to assume responsibility for the accuracy of billings to COT's own customers. These alleged agreements were much more favorable to COT than the tariff.

3. AT&T asserted at each pertinent stage of the district court proceedings that these claims could not, as a matter of law, be a basis for imposing liability. It contended that COT's state-law contract and tort claims were preempted by the filed tariff doctrine of Section 203 of the Act. AT&T pointed out that AT&T's tariffs defined the features of SDN and AT&T's rights, duties, and liabilities in provisioning and billing services, that no claim had been made that AT&T had violated the tariff provisions, and that nearly a century of Supreme Court and other decisions hold that state-law contract or tort claims that a carrier has committed to provide services under more favorable terms than required by its federal tariff are preempted.

The district court rejected these claims. In denying summary judgment, it held "that the filed rate doctrine does not apply to the conduct alleged," because "[p]laintiff here is not disputing the reasonableness or validity of the filed rate, or of the tariff generally. Instead, it is complaining of the manner in which AT&T provided services for which it had contracted." Order on Summary Judgment (ER 137); *see* App. 7a. In denying a directed verdict, the district court ruled that "the tariffs control" only "to the extent they expressly refer to certain things," and that parties can enter into "side deals" that impose additional or supplemental duties to provide service on more favorable terms. Transcript 6/20/94 (ER 2459-60).

A jury found for COT on its state-law claims and rejected AT&T's counterclaim for unpaid tariff charges.

On November 9, 1994, the district court granted in part AT&T's post-trial motion for judgment as a matter of law, holding that there had been no competent evidence of damages for the period after COT had terminated its AT&T services in September 1992. The court therefore entered an amended judgment of $1,154,000. App. 47a.

4. On appeal, two members of the panel upheld the judgment on the grounds that (1) a regulated common carrier's federal tariff is conclusive only as to the carrier's rates and not as to "the provisioning of services," "billing," or other features that are provided in exchange for those rates (App. 10a), and (2) if the carrier's tariff does not encompass a particular subject (which the majority held was a question of fact for the jury) then a carrier and its customer may lawfully enter into "side deals" on that subject that are enforceable under state law. App. 11a.

Judge Brunetti dissented. Noting that the "plain language of the statute mandates that tariffs include both rates and underlying services," and that the tariff in this case prescribed the parties' rights and obligations regarding not only rates, but also provisioning and billing, he concluded that the majority had "erroneously narrow[ed] the scope of the doctrine" and that holding "that anything less than all material aspects of the provided services are covered by the tariff eviscerates the 'heart' of the Communications Act." App. 21a, 20a, 22a. As to the majority's second point, Judge Brunetti concluded that the majority had misunderstood another aspect of the filed tariff doctrine, namely that it "expressly prohibits a carrier from contracting for services not covered by the published tariff." App. 23a. Therefore, because COT had attempted to contract for services that were "not covered in the tariff at the tariffed rate," Judge Brunetti reasoned, the alleged contract was not enforceable. *Id.*

On July 18, 1997, the court of appeals denied AT&T's petition for rehearing and suggestion for rehearing en banc. App. 49a.

REASONS FOR GRANTING THE PETITION

This Court previously has summarily reversed a decision of the Ninth Circuit failing to apply the filed tariff doctrine according to its terms and this Court's precedents. *Thurston Motor Lines, Inc.* v. *Jordan K. Rand, Ltd.*, 460 U.S. 533 (1983). It should do so again here.

In the decision below, the panel majority ignored a century of this Court's decisions. The filed tariff doctrine is central to the rate regulation of common carrier industries. It is derived from federal statutory requirements that common carrier services be provided to the public only pursuant to tariffs filed with the relevant federal agency. However, contrary to the well-settled precedents of this Court, and uniform decisions of other courts of appeals, the majority below held that federal tariffs that are statutorily required to be filed do not exclusively define the rights, liabilities, and duties of common carriers in providing regulated telecommunications service. In particular, the court of appeals held that (1) filed tariffs apply only to rates, not to other aspects of the service, and (2) in any event, side agreements can be enforced if they are found to impose additional obligations not contained in the tariffs.

That decision is foreclosed by the decisions of this Court and in conflict with the decisions of every other circuit to address the issue. Further, if allowed to stand, the decision will destroy the national uniformity that is the primary goal of the Communications Act and the many other statutes with identical filed-tariff requirements. Indeed, by enforcing the "side deals" COT alleges in this case, the court of appeals has made COT the beneficiary of the very discrimination that Sections 202 and 203 and the filed tariff doctrine were intended to prohibit.

Summary reversal is appropriate where, as here, "the law is well settled and stable, the facts are not in dispute, and the decision below is clearly in error." *Mireles* v. *Waco*, 502 U.S. 9, 15 (1991) (Scalia, J., dissenting)

(*quoting* R. Stern, E. Gressman, & S. Shapiro, Supreme Court Practice 281 (6th ed. 1986) (*quoting Schweiker* v. *Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting))). Alternatively, the Court should grant certiorari and order full briefing and argument.

1. The Communications Act, like several other federal regulatory statutes, copied the filed tariff provisions of the 1887 Interstate Commerce Act.[2] In addition to mandating that rates and other terms and conditions of service be reasonable and be provided without unjust discrimination (*e.g.*, 47 U.S.C. §§ 201(b) & 202(a)), the Act requires that "[e]very common carrier" file "schedules" (commonly referred to as "tariffs") that contain all its "charges" and all "classifications, practices, and regulations affecting such charges." *Id.* § 203(a). The Act prohibits rate discrimination by barring a carrier from collecting any "less or different compensation" than "specified" in the tariff or from "refund[ing]" "any portion of th[ose] charges" through any "device." *Id.* § 203(c)(1) & (2). Most pertinently here, the Act also prohibits any carrier from "extend[ing] to any person *any privileges* . . . in such communications," or employing "any classifications, regulations, or practices *affecting such charges*," that are not "specified" in the tariff. *Id.* § 203(c)(3) (emphases added).

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[2] *See* S. Rep. No. 781, 73d Cong., 2d Sess. 2, 4 (1934) & H.R. Rep. No. 1850, 73d Cong., 2d Sess. 4, 5 (1934) ("In this bill many provisions are copied verbatim from the Interstate Commerce Act because they apply directly to communications companies doing a common carrier business, but in some paragraphs the language is simplified and clarified. These variances or departures from the text of the Interstate Commerce Act are made for the purpose of clarification in their application to communications, rather than as a manifestation of congressional intent to attain a different objective."). Thus, this Court has routinely applied filed tariff decisions under the Interstate Commerce Act to the parallel provisions of the Communications Act. *See, e.g., MCI Telecommunications Corp.* v. *American Telephone and Telegraph Co.*, 512 U.S. 218, 229-31 (1994).

These statutory requirements embody what is known as the "filed-rate doctrine" or the "filed-tariff doctrine," which applies "across the spectrum of regulated utilities." *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 577 (1981). "The tariff-filing requirement is . . . the heart of the common-carrier section of the Communications Act." *MCI Telecommunications Corp.* v. *American Telephone & Telegraph Co.*, 512 U.S. 218, 229 (1994) ("MCI"). The filed tariff doctrine serves dual purposes. It prevents unjust discrimination by ensuring that all similarly situated customers are entitled to pay the same tariffed rates, receive the same tariffed service, and have the same federal remedies if the service violates the tariff or the Act's substantive requirements. *See Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116, 126-31 (1990); *see also MCI*, 512 U.S. at 230. It further operates as a strict rule against use of "parol" evidence and alleged side agreements, thus preventing easily manufactured claims against common carriers, which are *obliged* to provide service in accordance with their tariffs and have no freedom of contract. *Atchison, T. & S.F. Ry.* v. *Robinson*, 233 U.S. 173, 180-81 (1914).

2. A "century" of this Court's decisions hold, contrary to the panel majority, that a federally regulated carrier's filed tariff exclusively "governs the legal relationship between [customer] and carrier," and that "[t]he rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier." *Maislin*, 497 U.S. at 126, 130. These principles were applied, for example, in *Chicago & Alton R.R.* v. *Kirby*, 225 U.S. 155 (1912), one of the many decisions with which the judgment below directly conflicts.

In *Kirby*, a railroad agent had assured a shipper that his racehorses would be sent from Springfield, Illinois to New York City on a particular express train which would arrive in New York at the earliest possible time. The railroad's tariff, however, "did not provide for expedited service, nor for transportation by any particular train."

225 U.S. at 163. The railroad failed to ship the horses by the express train, and the shipper sued. The Court held that the shipper could not enforce this contract against the railroad:

> An advantage accorded by special agreement which affects the value of the service to the shipper and its cost to the carrier should be published in the tariffs, and for a breach of such contract, relief will be denied, because its allowance without such publication is a violation of the act. It is also illegal because it is an undue advantage in that it is not one open to all others in the same situation.

Id. at 165.

The decision below presents, in all relevant respects, the identical legal scenario, but reaches the opposite result. COT alleges that it entered into an agreement with AT&T personnel for expedited service and particularized billing, "an advantage which was not extended to all others," *id.*, and services "not provided for in the published tariffs." *Id.* at 166. The court of appeals nevertheless concluded that such side agreements were enforceable. It offered two rationales: (1) "[b]ecause this case does not involve rates or rate-setting, but rather involves the provisioning of services and billing under several contracts, the filed-rate doctrine does not apply," and (2) the filed tariff doctrine in any event applies only to matters contained in the tariff, and does not prohibit side deals to supplement the tariff. App. 10a, 11a. Both of those rationales are foreclosed by *Kirby* and numerous other cases.[3]

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[3] In a footnote, the majority attempted to distinguish *Kirby* on the grounds that (1) COT claimed that AT&T provided additional, non-tariffed services to others but not to COT, and (2) COT paid the same rates as other customers and AT&T did not seek higher rates. App. 9a. This footnote reflects substantial confusion. First, the contention that a carrier gave superior service to others cannot support a state law claim to enforce an untariffed side deal. Instead, it potentially gives rise to a claim for "unreasonable discrimination"

a. First, the filed tariff doctrine is not limited to rates, but applies to all terms and conditions of service. The Communications Act declares that the tariff filing requirement encompasses "classifications, practices, and regulations affecting" charges, as well as the charges themselves. 47 U.S.C. § 203(a). Both provisioning and billing of SDN, as well as rates and all other terms of service, were thus addressed in AT&T's tariff. *See* App. 21a-22a; 54a-56a. Indeed, the distinction between rates and other terms and conditions of service is meaningless; if a customer receives preferential treatment, it effectively pays a lower rate than other customers, for it receives additional or superior service for the same price.

As the *Kirby* Court thus explained, the parallel provisions of the Interstate Commerce Act forbid not only a carrier's attempt to employ "'any device whatever [to] transport[] at a less *rate* than that named in the tariffs'" but also actions "'whereby any *other* advantage is given or discrimination is practiced.'" 225 U.S. at 155 (quoting Elkins Act of 1903, 32 Stat. 847, c. 708) (emphases added)). The Court therefore held that the filed tariff doctrine barred the agreement for expedited service either because it "affects the value of the service to the shipper and its cost to the carrier" or, even if it did not alter the rate that the carrier should charge, "because it is an undue advantage in that it is not one open to all others in the same situation." *Id.* at 165.

Accordingly, this Court has expressly held that "the filed-rate doctrine is not limited to 'rates' *per se*." *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953, 966 (1986). "[W]ith respect to the service governed

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in violation of 47 U.S.C. § 202(a)—a claim COT did *not* raise in this case. Second, the fact that COT paid tariffed rates but is seeking additional services does not save its cause of action or distinguish *Kirby* at all. To the contrary, one of the principal reasons for the filed tariff doctrine is to *prevent* the discrimination that occurs when one customer pays the same rates as others while receiving preferential treatment.

by the Federal statute," carriers and customers cannot "alter the terms of the service as fixed by the filed [tariff] regulations," either "with respect to rates" *or* with respect to "any of the services" covered by the tariff. *Southern Ry.* v. *Prescott*, 240 U.S. 632, 638 (1916) (tariff applies to "the entire body of such services"); *see also Boston & Maine R.R. v. Hooker*, 233 U.S. 97, 119 (1914) (tariff applies to anything that "affect[s] the service to be rendered to the passenger").

b. Second, again contrary to the court of appeals' holding, any "side deal" for additional services or preferential treatment not provided for in the tariff is unenforceable. The Act prohibits carriers from affording customers any "privilege" or any "practice[] . . . affecting . . . charges" unless "specified" in the tariff. Thus, the tariff describes the entirety of the legal relationship between the carrier and the customer, and its terms "are conclusive as to the rights of the parties." *Atchison, T & S.F. Ry. Co.* v. *Robinson*, 233 U.S. 173, 180 (1914); *see also Western Union Telegraph Co.* v. *Esteve Bros. & Co.*, 256 U.S. 566, 572 (1921) (the tariff "represent[s] the whole duty and the whole liability of the company. It cannot be varied by agreement").

As the *Kirby* Court explained, the uniform treatment that the statute was designed to ensure "would be defeated if sanction be given to a special contract by which any such advantage is given to a particular shipper as that contracted for by the [railroad]." 225 U.S. at 166. To guarantee a customer, through an extra-tariff agreement, faster and better service than that afforded to others pursuant to the tariff would "give an advantage or preference not open to all and not provided for in the published tariffs," and would therefore necessarily be unlawful. *Id.*

Thus, the decisions of this Court uniformly hold that the filed tariff doctrine prohibits the enforcement under state law of oral or other side agreements to provide expedited service or to provide features of service in partic-

ular ways, whether or not the tariff specifically addresses that subject matter. For example, in *Davis* v. *Cornwell*, 264 U.S. 560 (1924), the Court (per Justice Brandeis) held invalid a carrier's agreement to provide a shipper with a number of railroad cars on a specified day when the tariff did not explicitly address that subject at all. The Court explained that "the assumption by the carrier" of any untariffed "additional obligation was necessarily a preference," for it would permit the customer to sue and recover lost profits for a breach, when similarly situated customers could not get that same recovery. *Id.* at 562. The Court held that, when the tariff is silent on the subject, the only "obligation of the common carrier" with regard to provisioning could be that "implied in the tariff": "to use diligence to provide, upon reasonable notice, cars for loading at the time desired." *Id.* at 561.

These principles have been followed in many subsequent decisions of this Court. *See, e.g., Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116, 132 (1990) ((permitting parties to alter rates by special agreement "opens the door to the possibility of the very abuses of unequal rates which it was the design of the statute to prohibit and punish") (quoting *Armour Packing Co.* v. *United States*, 209 U.S. 56, 81 (1908)) and (noting that "[t]his rule is undeniably strict and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination") (quoting *Louisville and Nashville R.R.* v. *Maxwell*, 237 U.S. 95, 97 (1915))); *Thurston Motor Lines, Inc.* v. *Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983) (summarily reversing; "the parties are held to the responsibilities imposed by federal law, to the exclusion of all other rules of obligation," and therefore "[a] carrier's claim is, of necessity, predicated on the tariff—not an understanding with the shipper"); *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 582 (1981) ("to permit parties to vary by private agreement the rates filed with

the Commission would undercut the clear purpose of the congressional scheme: granting the Commission an opportunity in every case to judge the reasonableness of the rate").

Ignoring this line of cases, the panel majority held that "even if the [filed tariff] doctrine could apply to other aspects of the SDN service," it "could not apply to any of COT's claims with regard to billing or provisioning" because the jury had been entitled to find that AT&T's tariffs did not cover these matters and that the untariffed agreements filled in "gaps." App. 11a. That is flatly inconsistent with Justice Brandeis's opinion for the Court in *Davis* v. *Cornwell* and the other prior decisions of this Court that squarely hold that statutory filed-tariff requirements would prohibit the imposition of liability on such grounds even if AT&T's tariffs had not addressed these matters (as they unequivocally did). Thus, COT's state-law claims were barred under controlling law because they rest on extra-tariff agreements that concededly cannot be implied in the tariff.

Indeed, the Ninth Circuit's decision was especially improper because, contrary to the panel majority's statements, AT&T's tariff *does* address these matters. It requires only that AT&T attempt with diligence to provision orders by whatever "due date" AT&T establishes, and it also states that AT&T is "not responsible" for billing a reseller's customers. *See* App. 55a, 56a.

In addition, it was entirely improper for the district court to permit the jury to decide—on the basis of "expert testimony"—the legal issue of the tariff's coverage. "Every question of the construction of a tariff is deemed a question of law," *Pan Am. Corp.* v. *Superior Court*, 366 U.S. 656, 666 (1961) (quoting *Great Northern R. Co.* v. *Merchants Elevator Co.*, 259 U.S. 285, 290 (1922)), and must be resolved "uniform[ly]" as a matter of federal law. *United States* v. *Western Pac. R.R.*, 352 U.S. 59, 64 (1956). No other court of appeals has failed to adhere

to this precept,[4] and even the Ninth Circuit has previously recognized that "expert testimony for the purpose of interpreting [a] tariff" is improper. *United States* v. *Atchison, T. & S.F. Ry.*, 725 F.2d 469, 470 (9th Cir. 1980).

3. Not surprisingly in light of the clarity of this Court's decisions, other circuits' decisions uniformly conflict with that of the Ninth Circuit in this case. For example, in *Paulson* v. *Greyhound Lines, Inc.*, 804 F.2d 506 (8th Cir. 1986), the court held that a carrier's alleged oral agreement to deliver a package by a particular time could not be enforced, for *Kirby* and other Supreme Court decisions established "as a matter of law" that a carrier "could not have breached [any] warranty or contract" that purportedly imposed obligations not contained in the tariff. *Id.* at 507-08 & n.5.[5]

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[4] *See, e.g., Durbin Paper Stock Co.* v. *ICC*, 585 F.2d 543, 544 n.4 (D.C. Cir. 1978); *Dunlop Tire & Rubber Corp.* v. *ICC*, 724 F.2d 349, 350 (2d Cir. 1983); *Montgomery Ward and Co.* v. *Roy Stone Transfer Corp.*, 329 F.2d 172, 174 (4th Cir. 1964); *Coca-Cola Co.* v. *Atchison, T. & S.F. Ry.*, 608 F.2d 213, 219-20 (5th Cir. 1979); *Rebel Motor Freight, Inc.* v. *ICC*, 971 F.2d 1288, 1290 (6th Cir. 1992); *Armour & Co.* v. *Chicago, M., St. P. & Pac. R.R.*, 188 F.2d 603, 608 (7th Cir.), *cert. denied*, 342 U.S. 860 (1951); *United States* v. *Great N. Ry.*, 337 F.2d 243, 246 (8th Cir. 1964); *Missouri Pac. R.R.* v. *Independent Mills, Inc.*, 706 F.2d 1080, 1083 (10th Cir. 1983); *United States* v. *Open Bulk Carriers*, 727 F.2d 1061, 1064 (11th Cir. 1984).

[5] In holding that the filed-tariff doctrine applies only to "rates or rate-setting," the panel majority relied on *H.J., Inc.* v. *Northwestern Bell Tel. Co.*, 954 F.2d 485, 488 (8th Cir.), *cert. denied*, 504 U.S. 957 (1992), citing it for the proposition that "[t]he filed-rate doctrine has two purposes: (1) to preserve the regulating agency's authority to determine the reasonableness of rates; and (2) to insure that the regulated entities charge only those rates that the agency has approved or been made aware of as the law may require." App. 10a. The quoted purposes are among the purposes of the filed-rate doctrine, and the Eighth Circuit discussed these in *H.J., Inc.* because the plaintiffs were seeking to challenge the reasonableness of filed rates, *see* 954 F.2d at 486-88, but *H.J., Inc.* did not hold that the doctrine applies only to rates.

Similarly, the Fifth Circuit rejected the panel majority's holding that the filed-rate doctrine applies only to "rates or rate-setting." The Fifth Circuit has squarely concluded that the discrimination that the filed-rate doctrine seeks to prevent "may result" either "from the charging of different rates to different shippers or passengers afforded the same service *or* from the offering of *special services* to only a select patron or group of patrons" *without* raising the rate. *Transcontinental Bus. System, Inc.* v. *CAB*, 383 F.2d 466, 481-82 (5th Cir. 1967) (emphases added, citations omitted), *cert. denied*, 390 U.S. 920 (1968).

The Seventh Circuit also refused to enforce an untariffed agreement that did not apply to rates, but that purportedly required the common carrier to provide transportation service in an agreed-upon manner. *Consumers' Mutual Oil Co.* v. *Schaff*, 59 F.2d 730 (7th Cir. 1932). The Seventh Circuit held that the untariffed agreement was "necessarily void" and stated that "[i]n our judgment this question has been so definitely settled by the Supreme Court that its further discussion by us would be quite superfluous." *Id.* at 731.

4. The decision below will have profound and adverse consequences not only for enforcement of the Communications Act and regulation of the telecommunications industry, but "across the spectrum of regulated utilities" that are governed by the filed tariff doctrine. *See Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571, 577 (1981). Filed tariffs are "the heart of the common-carrier section of the Communications Act" and the "essential characteristic of a rate-regulated industry." *MCI Telecommunications Corp.* v. *American Telephone & Telegraph Co.*, 512 U.S. 218, 229, 231 (1994). *See also Square D Co.* v. *Niagara Frontier Tariff Bureau*, 476 U.S. 409, 423 (1986) (filed tariff doctrine is "an essential element of the settled legal context"). Congress enacted it in a range of regulatory statutes to assure the national uniformity (*see Keogh* v. *Chicago & Northwestern Ry. Co.*, 260 U.S. 156,

163 (1922)) that is critical to the nondiscriminatory provision of common carrier services in numerous industries, including telecommunications,[6] motor carriage,[7] electric power,[8] natural gas,[9] and railroad transportation.[10] For these reasons, this Court has repeatedly acted to enforce the doctrine where federal agencies or courts have failed to do so—at least three times in the last fifteen years alone. *See, e.g., MCI*, 512 U.S. 218; *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990); *Thurston Motor Lines, Inc.* v. *Jordan K. Rand, Ltd.*, 460 U.S. 533 (1983).

As the dissent observed, however, the decision below renders the doctrine "an empty letter." App. 20a. Indeed, as Judge Brunetti explained, "regulation of rates divorced from services amounts to no regulation at all." App. 21a. The Ninth Circuit's decision would thus eliminate the national uniformity that the filed tariff doctrine was established to protect, and generate innumerable claims for the very discrimination and special preferences that statutes declare to be unlawful. "If oral agreements of this character can be sustained then the door is open to all manner of special contracts, departing from the schedules and rates filed with the Commission." *Robinson*, 233 U.S. at 181.

When AT&T sought rehearing on these grounds in the court of appeals, COT sought to minimize the significance of the decision by contending that the filed tariff doctrine was no longer of any import.[11] In support of this claim, it cited

[6] *MCI*, 512 U.S. 218.

[7] *Maislin*, 497 U.S. 116.

[8] *Nantahala Power & Light Co.* v. *Thornburg*, 476 U.S. 953 (1986).

[9] *Arkansas Louisiana Gas Co.* v. *Hall*, 453 U.S. 571 (1981).

[10] *Burlington Northern, Inc.* v. *United States*, 459 U.S. 131 (1982).

[11] COT also sought to defend the panel decision by relying on the provision of AT&T's tariff that does not limit the liability for "willful misconduct." Those claims are both irrelevant and erroneous. First, the Ninth Circuit's decision (properly) did not rely on this ground, and it is thus of no relevance at this stage. Second, in any event, the provision defines AT&T's liabilities for violation of its tariff; it could not lawfully, and does not, permit customers to recover lost profits by claiming that it was "willful misconduct" for AT&T to fail to implement the alleged untariffed side deals that would have given COT an illegitimate preference over similarly-situated customers.

a recent order of the Federal Communications Commission purporting to eliminate the filing of tariffs by some telecommunications carriers in some contexts.[12] That response is insubstantial. The order to which COT referred has not been permitted to become effective, for the Court of Appeals for the District of Columbia Circuit stayed it in response to a challenge to the FCC's authority to adopt it. In all events, the order would apply only to long-distance interexchange (not local exchange) carriers and only to domestic (not international) carriers, and the FCC would also continue to require the filing of tariffs for specified domestic long distance services.[13] Thus even if that order had been permitted to become effective, the filed tariff doctrine would continue to apply at least to the thousands of local exchange carriers that are required to file tariffs for interstate services and all the long distance carriers providing international services, as well as to tariffs filed and services provided pursuant to them before the Order took effect and to tariffs filed in the other industries that the FCC does not regulate. The filed tariff doctrine thus remains a vital part of the law, and it is only the judgment below that threatens to "eviscerate[]" it. App. 22a.

[12] *See Policy and Rules Concerning the Interstate Interexchange Marketplace* (CC Docket No. 96-61), *Second Report and Order*, 11 FCC Rcd. 20730 (1996), *stayed on appeal, MCI Telecomms. Corp.* v. *FCC*, No. 96-1459 (D.C. Cir., Feb. 13, 1997), *recon.*, FCC No. 97-293 (Aug. 20, 1997).

[13] *See id., Second Report and Order*, 11 FCC Rcd. 20730, ¶ 106 (1996).

CONCLUSION

The petition for a writ of certiorari should be granted, and this Court should summarily reverse the decision of the court of appeals, or in the alternative, set the case for briefing and argument.

Respectfully submitted,

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October 16, 1997

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 94-36116, 94-36156
D.C. No. CV-91-1236-JAJ

CENTRAL OFFICE TELEPHONE, INC.,
Plaintiff-Appellee-
Cross-Appellant.

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Defendant-Appellant-
Cross-Appellee.

Appeals from the United States District Court
for the District of Oregon
John A. Jelderks, Magistrate Judge, Presiding

Argued and Submitted
July 8, 1996—Portland, Oregon

Filed February 26, 1997

Before: Warren J. Ferguson and Melvin Brunetti,
Circuit Judges, and Samuel P. King,* District Judge.

Opinion by Judge King; Dissent by Judge Brunetti

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* The Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.

OPINION

KING, District Judge:

American Telephone & Telegraph Company ("AT&T") appeals the judgment of the magistrate judge, following a three-week jury trial, awarding Central Office Telephone, Inc. ("COT") $1.154 million in damages, and denying AT&T's claim for over $1 million in unpaid federally tariffed charges for long distance services, under the Federal Communications Act of 1934, ("Communications Act" or "Act") 47 U.S.C. § 153(h). COT's action against AT&T alleged breach of contract, breach of implied covenant of good faith and fair dealing, and tortious interference with contract. COT cross-appeals the magistrate judge's decision not to allow the jury to consider an award of punitive damages, as well as the magistrate judge's post-trial order reducing the original jury verdict of $13 million in compensatory damages in favor of COT.

COT, a reseller of long distance services, entered into a contract with AT&T for Software Defined Network ("SDN") services, which COT later resold to its customers. AT&T is a provider of long distance services and is classified as a common carrier under the Communications Act, 47 U.S.C. § 153(h), and therefore, its long distance services are subject to the requirements of § 203 of the Act, which contains statutory filed tariff requirements.[1] 47 U.S.C. § 203.

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[1] Among these are § 203(a)'s requirement that all common carriers (except connecting carriers) file a tariff showing all charges for itself and its connecting carriers' services, and the classifications, practices and regulations affecting such charges with the FCC, and § 203(c)'s prohibitions against charging different rates for services than those named in the filed schedules, and against "extend[ing] to any person any privileges or facilities. . . . or empoly[ing] or enforc[ing] any classifications, regulations, or practices affecting such charges, except as specified in the schedule." 47 U.S.C. § 203(c).

The tariffs filed with the Federal Communications Commission ("FCC") by AT&T set forth the rates for each of its long distance services. One of the services provided by AT&T is SDN, a long distance service which provides a physically separate long distance network for a customer's long distance service. In addition to describing rates for the service, the SDN tariff limits AT&T's liability for all but wilful misconduct.

SDN customers make large volume commitments, and therefore, SDN rates are lower than rates for other AT&T services. Because the set-up of an SDN network is complex, the tariff provides for an up-front installation charge to the customer. Once SDN is set up, the customer may add new locations or drop old ones from the network.

SDN has several characteristics attractive to switchless resellers[2] such as COT. It accommodates switched access, allowing resellers to offer the service to its customers who are generally small businesses or residences. Furthermore, Multilocation Billing ("MLB"),[3] added by AT&T in 1989, allows volume discounts to be apportioned between an SDN customer and individual locations on its network, in a proportion chosen by the customer. Under this opinion, AT&T sends bills directly to the reseller's customers, however, the reseller remains responsible for all payments. Another billing option offered is the Location Account Billing Option ("LABO"), under which

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[2] Switchless resellers are firms that purchase "bulk" long distance services from carriers and resell them to their own customers. They qualify for volume discount plans by aggregating the business of multiple customers who would not individually qualify for volume discounts. The reseller is the customer of AT&T and the end users are the customers of the reseller.

[3] AT&T contends that MLB is a tariffed service. However, in ruling on AT&T's motion for judgment as a matter of law, the magistrate judge held that "[MLB], a subject of considerable contention in this dispute, is an untariffed service that is subject to a separate agreement between the parties."

AT&T sends bills to each location at the discount rate, and each location is responsible for payment.

AT&T also instituted two tariffed pricing promotions in 1989 which are attractive to resellers. Expanded Volume Pricing plans ("EVPs"), offering additional discounts from the basic SDN rates for customers making large usage and duration commitments, and another promotion which waived the installation charges and per-location installation charges for customers making multi-year commitments, subject to penalties for early termination.

Following the 1989 changes in SDN service, orders from resellers increased, and AT&T experienced delays in provisioning SDN, especially switched access service. Billing problems also occurred, most notably, "suppressed billing"[4] which resulted in customers not receiving bills for calls for up to one year after the calls were made.[5]

In light of the problems with SDN, AT&T limited the number of new SDN customers. AT&T also transferred servicing of all reseller customers to the Channel Development and Operations Center ("CDOC").[6] The CDOC was the successor to the Carrier Service Center, which had previously done business with AT&T's reseller customers.

COT placed orders for SDN, after COT's president became aware of SDN in 1989, and contacted AT&T's Portland office regarding the service. On October 30, 1989, COT signed an agreement for SDN service, and selected

[4] Suppressed billing occurs when a location is on the SDN network but does not have a "billing guide" in place to match its phone usage billing record. The billing system therefore has nowhere to register the call and the calls are lumped into a "unbilled" toll group until the billing guide is set up. Once the guide is set up, the customer is billed for past unbilled calls.

[5] COT was still experiencing billing problems in 1992 when it filed suit.

[6] The CDOC has two locations, one in Pleasanton, California, the other in Piscataway, New Jersey.

Multi Location Billing. AT&T represented to COT that the service would be provisioned in four to five months, and thereafter, additional orders within 30 days. In February, AT&T advised COT that new orders would take 45 to 90 days due to provisioning problems, and informed COT that another AT&T service, Multi Location Calling Plan ("MLCP") would service COT's customers until they were provisioned onto SDN.

COT began reselling SDN services in April 1990, and immediately experienced problems with the network including provisioning delays and suppressed billing. COT also experienced an additional billing problem; COT's customers received 100% of the discount instead of the 50% COT had selected, because COT was billed under the LABO billing option rather than the MLB billing COT had selected. COT continued to experience problems with provisioning and billing, and in October 1990 COT switched from MLB billing to Network Billing, under which AT&T sent COT a single bill which COT was responsible for paying. COT then sent individual bills to its customers.

Although COT continued to sell SDN, it was ultimately unable to meet its usage commitment for the first period in which it was applicable. In addition, AT&T claimed that COT had failed to pay nearly $200,000 in bills from the period in which COT was under MLB billing. On September 21, 1992, COT's president informed AT&T that COT was terminating its contract as of September 30, 1992, with 1½ years remaining in the contract.

COT filed suit on November 27, 1991. COT ultimately pursued three state law claims at trial: breach of contract, breach of implied covenant of good faith and fair dealing, and tortious interference with contract.[7] COT's state law

[7] Because the magistrate judge treated the first two claims as one breach of contract claim, COT states that only two claims were before the jury.

claims were based on COT's allegation that the contracts entered into with AT&T did not constitute the ordering of long distance pursuant to the requirements of AT&T's tariff, but rather constituted voluntary contracts in which COT agreed to purchase, and AT&T agreed to provide long distance services. COT also claimed that the contracts encompassed more than the written orders, and included all the understandings that COT's president had from reading service brochures and from talking with AT&T representatives.

COT argued that AT&T's failure to provision SDN orders in a reasonable manner, failure to properly allocate discounts between COT and its customers under Multilocation Billing, failure to offer SDN and MLCP services which were functional for COT, failure to initially credit MLCP usage to SDN, failure to provide timely call detail to COT and its customers, and failure to afford COT international calling capability at a reasonable completion rate, as well as a requirement that COT post a deposit, and AT&T's provisioning of calling card capabilities under Network Remote Features rather than an SDN calling card bearing both COT's and AT&T's logo, constituted breach of contract.

COT also claimed that AT&T breached its state law implied duty of good faith and fair dealing by taking actions that undermined the purpose of the contract, which was to obtain services, and resell them at a profit. COT's tortious interference with contract claim alleged that because COT had promised certain benefits of SDN to its customers, and because AT&T provided competing services, any violation of AT&T's contractual duties constituted tortious interference with COT's relationship with its customers.

Furthermore, COT alleged that AT&T's conduct was wilful and therefore consequential damages could be awarded under the terms of its tariff. COT claimed the wilful conduct consisted of running a promotion for SDN

when AT&T did not have the capability to provision COT and other resellers to the CDOC. COT also argued that improper purpose could be inferred from certain internal AT&T documents discussing proposed SDN changes.

At three stages of the proceedings below,[8] AT&T asserted that COT's state law contract and tort claims were preempted by the filed tariff doctrine of § 203 of the Communications Act. The magistrate judge rejected this claim and denied AT&T's Motion for Summary Judgment as to its counterclaim and all of COT's claims, excepting COT's negligent misrepresentation claim. *Central Office Tel. Co., Inc. v. AT&T*, Civ. No. 91-1236-JE (E.D. Or. 1991). In denying AT&T's motion for summary judgment on its counterclaim and on COT's claim for breach of contract, the magistrate judge found AT&T's reading of the filed-rate doctrine too broad. The magistrate judge also found that because COT was not disputing the filed-rate's reasonableness or validity, or that of the tariff in general, but rather was complaining about the manner in which AT&T provided the services for which COT contracted, the field-rate doctrine did not apply. *Id.* at 16.

The magistrate judge also rejected AT&T's argument that there was no substantial evidence that any of its chal-

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[8] Before trial, AT&T moved for partial summary judgment on its counter-claim for unpaid tariffed charges, and for summary judgment on the then remaining seven state law claims made by COT in its Amended and Supplemental Complaint. COT disputes that AT&T specifically raised the issue of preemption. However, AT&T did argue that "the filed tariff doctrine requires entry of judgment in favor of a carrier, even though its customer has state law claims related to the reasonableness of the tariff rates or charges." Def. Mot. in Supp. of Mot. for Summ. Jmt. at 22. After trial, AT&T moved for a directed verdict on COT's breach of contract and breach of implied covenant claims, arguing, *inter alia*, that COT's state law contract claims were barred by the filed tariff doctrine and preempted by the Communications Act. AT&T's Mem. in Supp. of Mot. for Directed Verdict. AT&T reiterated this argument in its Motion For Judgment as a Matter of Law following the jury verdict.

lenged conduct constituted wilful misconduct within the meaning of its tariff. In addition, AT&T moved to exclude a lost profits study prepared by COT's damage expert, which motion was denied. COT requested that it be allowed to present evidence of AT&T's financial condition in support of its claim for punitive damages, however, the court also denied this request.

The jury returned a verdict of $13 million in favor of COT on its breach of contract and intentional interference claims, and also in favor of COT on AT&T's counter-claim for unpaid tariff charges. Judgment was entered on July 1, 1994. AT&T then moved for judgment as a matter of law, for a new trial or for remittitur. The court denied AT&T's motions for new trial and remittitur, and ruled as a matter of law that the filed-rate doctrine did not preempt COT's claims. The magistrate judge also granted AT&T partial judgment as a matter of law and cut-off COT's damages for the period after September 1992, finding there was no competent evidence for this period. The magistrate judge then entered an amended judgment awarding COT $1,154,000. COT moved, pursuant to Fed. R. Civ. P. 59(c), to alter the amended judgment on the grounds that the court had relied on the wrong exhibit when it calculated pre-September damages. The court denied the motion.

On appeal, AT&T reiterates its contention that COT's state law claims are preempted by the Communications Act. COT counters that AT&T failed to provide untariffed services and engaged in wilful misconduct, and therefore, the filed-rate doctrine does not apply and its claims are not preempted. Therefore, it must initially be determined whether the magistrate judge was correct in holding as a matter of law that the filed-rate doctrine did not apply to COT's claims. We review a district court's decision regarding motions for judgment as a matter of law pursuant to Fed. R. Civ. P. 50 de novo. *Montiel v. City of Los Angeles*, 2 F.3d 335, 342 (9th Cir. 1993).

AT&T argues that statutory filed tariff requirements preempt any state law claims that a carrier has expressly or impliedly agreed to provide a customer with services that are better or different from that required by the carrier's filed tariffs. Under 47 U.S.C. § 203 (a), communications common carriers must file tariffs with the FCC. The tariff-filing requirements were taken from the Interstate Commerce Act ("ICA"), and the Supreme Court has stated that, like rate-filing under the ICA, tariff-filing under the Communications Act is "Congress's chosen means of preventing unreasonableness and discrimination in charges; . . . the tariff-filing requirement is the heart of the common-carrier section of the Communications Act." *MCI v. AT&T*, —— U.S. ——, 114 S. Ct. 2223, 2231 (1994). The filed tariff doctrine (or filed-rate doctrine) forbids a regulated entity from charging rates for its services other than those filed with the appropriate regulatory authority. *Arkansas Louisiana Gas, Co. v. Hall*, 453 U.S. 571, 577 (1981). The filed-rate of the carrier is the only lawful rate a carrier may charge, and it is strictly construed. *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 127 (1990) (interpreting the filed-rate provisions of the ICA); *MCI*, 114 S. Ct. at 231. Furthermore, "the filed-rate governs the legal relationship between the shipper and the carrier." *Maislin*, 497 U.S. at 126.

AT&T argues that a long line of Supreme Court Cases establish that the filed-rate doctrine precludes a carrier from entering into "side-deals" which give preference to certain customers and are not defined in the filed-rates.[9]

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[9] AT&T cites several cases in support of this argument including: *Chicago & Alton R.R. v. Kirby*, 225 U.S. 155 (1912) (holding a contract between a carrier and a shipper, under which the shipper guaranteed racehorses would be shipped on certain train, invalid because it was not published in the tariffs and gave one shipper an advantage not available to all), *Davis v. Cornwell*, 264 U.S. 560 (1924) (holding agreement to provide a shipper a number of railroad cars on a specified day invalid because the tariff did not provide

COT argues that AT&T's cases establish that a carrier may not provide special or extra services to certain customers that are not defined in the tariffs, such that the customer actually pays a lower rate. Furthermore, COT argues that it paid the same rates as AT&T's corporate customers and that its claims do not involve the tariff rates.

The filed-rate doctrine has two purposes: (1) to preserve the regulating agency's authority to determine the reasonableness of rates; and (2) to insure that the regulated entities charge only those rates that the agency has approved or been made aware of as the law may require. *H.J., Inc. v. Northwestern Bell Telephone Co.*, 954 F.2d 485, 488 (8th Cir.), *cert. denied*, 504 U.S. 957 (1992). Because this case does not involve rates or rate-setting, but rather involves the provisioning of services and billing under several contracts, the filed-rate doctrine does not apply.[10]

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for specification of shipping date); *Atchison v. T. & S.F. Ry. v. Robinson*, 233 U.S. 173 (1914) (holding an agreement to provide expedited shipping not enforceable because it was not contained in carrier's tariff). As pointed out by COT and stated explicitly in *Chicago*, the agreements cited in these cases were for special expedited shipping services for which the customer would have been expected to pay a higher rate. The Court thus found that the special service should have been included in the tariff and made available to all. 255 U.S. at 165. COT contends that AT&T provided special services to others, but denied them to COT. There is no allegation by either AT&T or COT that COT did not pay the same rates as others who sought the same services from AT&T, nor does AT&T contend that COT should have paid higher rates than those in the tariffs.

[10] In *Wegonland Ltd. v. NYNEX Corp.*, 27 F.3d 17, 19 (2d Cir. 1994), the Second Circuit noted that there are two corresponding interests involved with the filed-rate doctrine which have turned up in Supreme Court decisions: the justiciability of determining reasonable rates, and the potential discrimination in rates between ratepayers. Both of these interests involve the payment of rates and do not refer to contractual obligations to provide services as AT&T contends. AT&T argues that the filed-rate doctrine does not only

However, assuming arguendo, that COT's claims are covered by the filed-rate doctrine, the filed-rate doctrine could not apply to any of COT's claims with regard to billing or provisioning. As noted by the magistrate judge, Multi Location Billing, the option originally chosen by COT, was not covered by the tariff. AT&T's tariff expert testified at trial that billing procedures were not covered by AT&T's tariffs. In addition, the mutually agreed upon facts given in the jury instructions state that COT chose MLB, and that it was not covered by the tariff. Furthermore, AT&T's tariff expert also testified at trial that the provisioning of SDN services was not covered by the tariff. Therefore, the filed-rate doctrine could not apply to any of COT's claims with regard to billing or provisioning, even if the doctrine could apply to other aspects of the SDN service.[11]

Having determined that COT's claims are not preempted by the filed-rate doctrine, it follows that the magistrate judge was not in error, as AT&T asserts, by failing to instruct the jury that the only issue was whether AT&T violated its tariff through wilful misconduct. Likewise, the magistrate judge did not err in denying AT&T's motion

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apply to rates, citing *Western Union Telegraph Co. v. Esteve Bros. & Co.*, 256 U.S. 566, 571-72 (1921). This case in fact involved two classes of rates. Messages sent at the lower rate were sent only once and provided for limited liability for messages not received. The other, was more expensive and provided that messages would be repeated. The court found that the limitation of liability was part of the rate because the customer accepted the risk of the message being wrongly transmitted by choosing the cheaper rate and having the message sent only once. The Court further found that allowing recovery of damages to those who chose a lower rate would create a preference over those who paid the higher rate to insure their message was transmitted correctly. *Id.*

[11] In addition, AT&T's expert testified that the provisions of the tariffs do not apply to the relationship of AT&T to the reseller, but rather, only apply to the relationship between AT&T and the end user.

for judgment as a matter of law for unpaid tariff charges owed by COT. AT&T maintains that the same errors of law which applied to its argument that COT's state law and contract claims were preempted by the filed-tariff doctrine require the reversal of the denial of its counterclaim. Previously, AT&T had argued that the filed-rate doctrine barred the application of equitable defenses against the collection of debts incurred pursuant to a tariff filed with the appropriate agency. *Maislin*, 497 U.S. 116 (1990).

The magistrate judge, however, found that COT was not disputing the validity of the rates charged under the tariff, but rather, the accuracy of AT&T's calculations and AT&T's right to collect for services for which COT's customers were not accurately billed. Once again, AT&T bases its argument on the assumption that all rights between AT&T and COT are governed by the tariff. As already discussed, this is not the case.

COT argues that AT&T failed to provide the services it was promised, including correct billing.[12] COT also argues that the jury rejected the counterclaim based on the evidence it presented including testimony that COT paid all amounts owed for SDN service, as reflected in COT's records, that approximately $130,000 of alleged unpaid tolls resulted from incorrect AT&T billings and another $68,000-69,000 from unexplained charges, and evidence that AT&T's billing was flawed and showed wild fluctuations. Given that AT&T cannot rely on its filed-rate tariff argument to shield itself from COT's claims and that the evidence presented by COT suggests that AT&T did not properly bill COT, it was not error for the magistrate judge to deny AT&T's motion for judgment as a matter of law on its counterclaim.

[12] The parties do not dispute that COT paid all charges owed after it took over billing for itself, following AT&T's inability to correctly bill COT's customers as promised.

In addition, AT&T maintains, as it did both during and after trial, that COT's failure to produce any competent evidence of damages is independent ground for reversal of the amended judgment, and that because the testimony of COT's damage expert should not have been admitted, the $1.154 million award should be reversed and judgment entered for AT&T.

Evidentiary rulings are reviewed for an abuse of discretion, and should not be reversed absent some prejudice. *City of Long Beach v. Standard Oil Co.*, 46 F.3d 929, 936 (9th Cir. 1995); *The Monotype Corp. v. Int'l Typeface Corp.*, 43 F.3d 443, 448 (9th Cir. 1994).[13]

Initially, the parties disagree over whether state or federal law should apply when determining whether the evidence supports a claim for lost profits. AT&T argues that federal law should apply citing a Fifth Circuit case for this proposition, *University Computing Co. v. Management Science*, 810 F.2d 1395 (5th Cir. 1987). However, in *University Computing*, the court found that federal law determined the sufficiency of the evidence with reference to state substantive law on lost profits. *Id.* at 1396. In *Milgrad Tempering, Inc. v. Selas Corp. of America*, 902 F.2d 703 (9th Cir. 1990), the defendant challenged damage awards as speculative and unsupported by the evidence. *Id.* at 710. This Court stated that the determination of damages was a question of fact which will not be disturbed unless it is clearly unsupported by the evidence. *Id.* The Court then laid out the test for lost profits under Washington State Law. *Id.*

Oregon law states that the essential ingredient of proof of lost profits to a reasonable certainty is supporting data.

[13] AT&T asserts that the proper standard is de novo review, citing *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311 (9th Cir.), *cert. denied*, 116 S. Ct. 189 (1995). However, the de novo standard enunciated in *Daubert* applies to scientific evidence under Fed. R. Evid. 702 and there is no indication that the standard is meant to apply to all expert testimony.

Hardwick v. Dravo Equip. Co., 569 P.2d 588, 591 (Or. 1977). Expert testimony alone can provide a sufficient factual basis for an award of lost profits. *Milgrad*, 902 at 711.

After reviewing in detail the method used by COT's expert to calculate lost profits, the magistrate judge, in his order denying in part and granting in part AT&T's motion for judgment as a matter of law, found that COT was not entitled to recover damages for the period following the termination of its contract with AT&T. However, he found that COT's damage expert's study was "sufficiently grounded in objectively verifiable facts and reasonable assumptions to support the jury's award of lost past profits up to COT termination of its SDN sales in September 1992." Thus referring to the standard for lost profits enunciated by the Oregon Supreme Court, the magistrate judge did not abuse his discretion by allowing the testimony to go to the jury.

Additionally, COT makes several arguments concerning the errors made by the magistrate judge in limiting its damage award. First COT argues that under Oregon Law, lost profits may be recovered for tort as well as contract actions, and therefore, the magistrate judge erred in limiting the damages to the contract period. The magistrate judge, however, limited the damage award to the contract period because he found that determining damages beyond that period was too speculative, not because he found that damages should only encompass the term of the contract. In reviewing the size of jury verdicts, the proper role of trial and appellate courts in the federal system is a matter of federal law. *Donovan v. Penn Shipping Co.*, 429 U.S. 648, 649 (1977) (per curiam). The district court determines whether the jury's verdict is within the confines of state law. *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disp., Inc*, 492 U.S. 257, 279 (1989). Under Oregon law lost profits damages must be proven

to a reasonable certainty. *Welch v. Bancorp Realty and Mortgage Trust*, 596 P.2d 947, 964 (Or. 1979); *Hardwick v. Dravo Equip. Co.*, 569 P.2d 588, 591 (Or. 1977). An essential ingredient of proof of lost profits to a reasonable certainty is supporting data. *Hardwick*, 569 P.2d at 591.

COT contends that the magistrate judge improperly applied an absolute certainty test when he determined that COT's expert's testimony was insufficient because he did not know the number of salespeople COT employed after 1990, and because he based his projections on 10 salespeople when in fact COT employed only four. Although the magistrate judge found no evidence to support this opinion, COT argues that it was supported by COT's president who testified that he intended to hire two more salespeople and to open additional offices in each. However, COT points to no evidence which indicates these plans would have come to fruition had COT not terminated its contract with AT&T.[14] Therefore, it cannot be said that the magistrate judge applied an absolute certainty standard by finding that experts must have some verifiable basis for their opinion.

COT also maintains that the magistrate judge impermissibly reweighed the evidence when he found fault with the expert's failure to make specific allowance for bad debts and failure to account for the effect of technological changes. Although it is true that the court should not reweigh the evidence, *Garvin v. Greenback*, 856 F.2d 1392, 1396 (9th cir. 1988), the court must still view the evidence in the light most favorable to the non-moving party to determine if the verdict is supported by substantial evi-

[14] COT points to *Hardwick* for the proposition that lost profits calculations which project additional employees for the damages period meet the substantial certainty test. 569 P.2d at 591. However, in *Hardwick*, the additional projected employees were based on the number of people that plaintiff would have needed if the log loader at issue in the breach of contract case had not been defective.

dence. *Jeanery, Inc. v. James Jeans, Inc.*, 849 F.2d 1148, 1151 (9th Cir. 1988). As to both of these factors, the magistrate judge could find no basis for the expert's opinions other than the expert's own assumptions.[15]

Other problems identified by the magistrate judge included, the expert's failure to account for the fact that COT intended to do its own billing in the future, the expert's assumptions that the discount levels would remain constant through the year 2000, his failure to talk to any customers or provide for possible competition, and his failure to research similar services provided by other companies before declaring SDN to be a unique product. This latter point, the magistrate judge stated, was very significant because a reseller can recover profits lost by a supplier's failure to deliver if no substitute can be found.[16] Relatedly, the magistrate judge found that the expert had considered all profits that COT might have realized through selling SDN as lost, without accounting for increased effort and sales of services provided by AT&T competitors.

Finally, the magistrate judge found that COT's expert failed to take into account that the problems COT encountered with AT&T's SDN services would have continued throughout the contract period and into the future. The magistrate judge therefore held that the expert testimony was not sufficient to support seven years of lost profits recovery.

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[15] COT argues that AT&T's own witness testified that COT would remain viable until 1998. However, although this testimony may have been offered to the jury, the future technological status of SDN was not included by the expert in his forecast of lost profits, and is a different issue entirely.

[16] For this proposition, the magistrate judge cited *Calbag Metals Co. v. Atkinson Co.*, 770 P.2d 600, 602-03 (Or. 1989); *United Engine Parts Co. v. Reid*, 584 P.2d 275 (1978); *Consolidated Data Terminals v. Applied Digital Data Sys.*, 708 F.2d 385, 394-95 (9th Cir. 1983).

Given the myriad of flaws identified by the magistrate judge, it does not appear that, even viewing the evidence in the light most favorable to COT, AT&T was not entitled to judgment as a matter of law on the post-contract claim.

In the alternative, COT argues that if this Court finds that the jury verdict was not supported by substantial evidence, the district court must nevertheless be reversed because the magistrate judge improperly reduced the jury award in violation of th Seventh Amendment. The Seventh Amendment controls the allocation of authority to review verdicts in federal courts. *Gasperini v. Center for Humanities, Inc.*, —— U.S. —— 116 S.Ct. 2211 (1996). The Supreme Court has held that the re-examination clause of the amendment does not inhibit the power of the trial judge to grant new trials or to order remittitur. *Gasperini*, 116 S. Ct. at 2222.

Upon motion for a new trial, a trial court, finding a verdict excessive may either order a new trial or deny the motion conditional on the party accepting a remittitur. *Fenner v. Dependable Trucking Co., Inc.*, 716 F.2d 598, 603 (9th Cir. 1983). COT argues that it should have been given this option before the jury's award was reduced. However, the magistrate judge did not reduce the award upon AT&T's motion for a new trial, but rather upon their motion for judgment as a matter of law. Rule 50 of the Federal Rules of Civil Procedure allows a court to set aside the verdict of the jury and enter judgment as a matter of law, and has been held to be constitutionally compatible with the Seventh Amendment. *Gasperini*, 116 S.Ct. at 2224 n.20; Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure*, § 2522, pp. 241-42 (2d ed. 1995). The magistrate judge's action under Rule 50 does not appear to be in conflict with the Seventh Amendment.

Furthermore, COT also argues that the magistrate judge improperly granted judgment as a matter of law

based on a truncated trial record. COT asserts that it is reversible error for a district court to admit an expert's lost profit evidence at trial then, after eliminating the expert's evidence post-trial, and to grant judgment as a matter of law. *See Midcontinent Broadcasting Co. v. North Central Airlines, Inc.*, 471 F.2d 357, 358-59 (8th Cir. 1973) (holding same). Although it is true, as COT states, that a trial judge must consider all the evidence submitted in ruling on a motion for judgment as a matter of law, contrary to COT's position, the magistrate judge did not only consider a portion of the evidence submitted to the jury. Instead, the magistrate judge considered the entirety of the testimony of COT's expert, found that he should not have allowed the post-contract period evidence to be submitted, then reduced the jury's damage award. Therefore, COT's argument on this issue is misplaced.

The final issue on appeal concerns COT's punitive damage request. COT argues that, under Oregon law, when a plaintiff establishes a prima facie case of intentional interference with business relations, the plaintiff is entitled to present evidence of the defendant's financial condition in support of its claim for punitive damages. Or. Rev. Stat. 41.315. COT asserts that it presented a prima facie case of intentional interference with business relationships, survived AT&T's motion for judgment as a matter of law and convinced the jury that AT&T was an intentional tortfeasor, and therefore the magistrate judge erred in withholding its punitive damage claim from the jury.

Whether to award punitive damages is a question of state law and is, therefore, reviewed de novo. *Mapes v. United States*, 15 F.3d 138, 140 (9th Cir. 1994). This Court must apply Oregon's law as the Oregon Supreme Court would apply it. *Intel Corp. v. Hartford Accident & Idem. Co.*, 952 F.2d 1551, 1556 (9th Cir. 1991). Under Oregon Law, punitive damages are available when

there is evidence of malicious or wanton conduct.[17] *Van Lom v. Schneiderian*, 210 P.2d 468 (Or. 1949). When punitive damages are sought, the judge determines whether there is evidence of malice as a matter of law, and if he decides there is, the assessment of damages is committed to the jury's discretion. *Van Lom*, 210 P.2d at 469. This court has determined that punitive damages may be awarded under Oregon State law for the tort of tortious interference with an economic relationship, *Kraus v. Santa Fe Southern Pac. Corp.*, 878 F.2d 1193 (9th Cir. 1989), *cert. dismissed*, 493 U.S. 1051 (1990), and Oregon courts have held that punitive damages may be awarded for tortious interference with a business relationship if actual damages are awarded on the same claim. *Employees Fire Ins. Co. v. Love It Ice Cream Co.*, 670 P.2d 160 (Or. App. 1982) (citing *Belleville v. Davis*, 498 P.2d 844 (1972)).

COT argues that, having prevailed on its claim for tortious interference with contract, the magistrate judge erred in not instructing the jury on punitive damages. In denying COT's instruction on punitive damages and not allowing COT to introduce evidence of AT&T's financial condition, the magistrate judge noted his concerns over prejudicing the jury. However, because this Court conducts de novo review on this issue, and in light of the jury verdict in this case, it appears that the punitive damage instruction should have not been given. The Oregon Supreme Court has held that when an error affects only the availability and amount of punitive damages, it is appropriate to remand that case for trial on those issues. *Honeywell v. Sterling Furniture Co.*, 797 P.2d 1019, 1023 (Or. 1990). Therefore, it is appropriate to remand

[17] The Oregon Supreme Court has sanctioned the award of punitive damages "whenever there was evidence of a wrongful act done intentionally, with knowledge that it would cause harm to a particular person or persons." *McElwain v. Georgia-Pacific Co.*, 421 P.2d 957 (Or. 1966).

the case for a new trial on the issue of punitive damages.

For the foregoing reasons, the magistrate judge's post-trial judgments are affirmed. However, his decision not to submit punitive damages evidence to the jury is reversed, and the case remanded on the issue of punitive damages.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

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BRUNETTI, Circuit Judge, dissenting:

I dissent because I believe that the filed-rate doctrine preempts COT's state-law claims. I would reverse the magistrate judge's legal conclusion that the doctrine does not do so and mandate that the court dismiss COT's pre-empted state-law claims.

The majority concludes that the filed-rate doctrine does not preempt COT's claims because: (a) the case involves the provisioning of services rather than rate-setting; or alternatively, (b) the services at issue were not covered by the tariff. Both proffered reasons misinterpret the filed-rate doctrine.

A. *Both Rates and Corresponding Services Are Covered by the Filed-Rate Doctrine.*

To avoid being an empty letter, the filed-rate doctrine must encompass both rates and the services corresponding to those rates. The opinion erroneously narrows the scope of the doctrine by stating that "[b]ecause this case does not involve rates or rate-setting, but rather involves the provisioning of services and billing under several contracts, the filed-rate doctrine does not apply."

The Communications Act provides that "[e]very common carrier . . . shall . . . file with the Commission and print and keep open for public inspection schedules showing all charges . . . and showing the classifications,

practices, and regulations affecting such charges." 47 U.S.C. § 203(a). The plain language of the statute mandates that tariffs include both rates and underlying services. Limiting the filed-rate doctrine to the rate-setting portion of the tariff undermines the goal which Congress expressed in section 203(a): the provision of rates and services in a nondiscriminatory manner.

In its most recent examination of this issue, the Supreme Court repeatedly stressed section 203(a)'s importance: "[t]he tariff-filing requirement is . . . the heart of the common-carrier section of the Communications Act." *MCI v. AT&T*, 514 U.S. 218, 114 S. Ct. 2223, 2231 (1994). "[R]ate filing was Congress's chosen means of preventing unreasonableness and discrimination in charges. . . ." *Id.* "Rate filings are, in fact, the essential characteristic of a rate-regulated industry." *Id.* at 2232.

Although the majority's interpretation would hold otherwise, rates have no meaning unless tied to corresponding services. Yet the majority argues that only the rate portions of the tariff are subject to preemption. Extending this analysis, carriers would be bound only to those rates and not to the corresponding services. If this were so, carriers could easily devise schemes to avoid the Communications Act's fairness requirements. In truth, regulation of rates divorced from services amounts to no regulation at all. For the requirements of the Communications Act to possess any import, both the rates and corresponding services must be covered by the filed-rate doctrine.

An examination of the tariff at issue illustrates this point. AT&T's tariff prescribes not only the rates for various types of services, but also AT&T's rights and liabilities in each of the areas in which COT claims that AT&T breached its obligations. These include: provisioning orders, billing, providing calling cards, requiring deposits and providing the long distance service itself. *See*,

e.g., AT&T Tariff F.C.C. No. 1, § 2.5.10 (provisioning), § 6.2.4 (billing), § 2.5.12.B (calling card), § 2.5.6 (deposits), § 6.2.5 (service support). The service specifics are clearly delineated in the tariff itself.

It is both counterintuitive and inconsistent with the traditional importance of the Communications Act to suppose that the filed-rate doctrine would encompass the rates in the tariff, but not the services contained in the same document. *See MCI*, 114 S. Ct. at 2226-28 (detailing historical importance of Communications Act). To hold that anything less than all material aspects of the provided services are covered by the tariff eviscerates the "heart" of the Communications Act.

B. *Because the Services at Issue Were Not Covered by the Tariff, COT's Claims Are Preempted.*

The majority also concludes that the filed-rate doctrine does not preempt COT's claims because the tariff did not cover the services at issue. Although they are correct in asserting that the services were not in the tariff, it is precisely for this reason that COT's claims are preempted. AT&T is simply barred from contracting for non-tariffed services. To analyze this transaction it is necessary to examine both the filed-rate doctrine and the specific tariff at issue.

In its most general terms, a filed tariff controls the legal relationship between a long-distance carrier and its customers. *See Maislin Indus. v. Primary Steel, Inc.*, 497 U.S. 116, 126 (1990) ("This Court has long understood that the filed rate governs the legal relationship between shipper and carrier."). As the authorities cited by the majority acknowledge, AT&T is not allowed to provide services without filing a tariff setting the rate and all "classifications, practices, and regulations" corresponding to the rate. Furthermore, "[t]he rights as defined by the tariff cannot be varied or enlarged by either contract or

tort of the carrier . . . ." *Id.* (quoting *Keogh v. Chicago & Northwestern Ry. Co.*, 260 U.S. 156, 163 (1922). If AT&T could simply contract for untariffed services, it would never have to file a tariff in the first place and the filed-rate doctrine would be rendered meaningless.

However, COT argues, and the majority agrees, that AT&T entered into an enforceable contract for services which were not covered by the tariff. This argument misreads the filed-rate doctrine, which expressly prohibits a carrier from contracting for services not covered by the published tariff.

Chicago & Alton R.R. v. Kirby, 225 U.S. 155 (1912), a case the majority addresses in a footnote, illustrates the operation of the doctrine. (Majority Opinion, footnote number 9). In *Kirby*, a carrier contracted with a shipper to deliver cargo on a expedited basis. When the carrier failed to perform, the shipper sued for breach of contract. The Supreme Court held that the contract was invalid under the filed-rate doctrine because the carrier's tariffs "did not provide for an expedited service, nor for transportation by any particular train" and gave "an advantage or preference not open to all and not provided for in the published tariffs." *Id.* 163-66. *See also Davis v. Cornwell*, 264 U.S. 560 (1924), *Atchison, T. & S.F. Ry. v. Robinson*, 233 U.S. 173 (1914).

The majority attempts to distinguish *Kirby* and its progeny by reasoning that COT is not seeking to obtain for the tariffed rate extra services not covered in the tariff, but is merely seeking the same services provided to AT&T's other customers. This is incorrect. COT is seeking services that are not covered in the tariff at the tariffed rate.

The majority also argues that COT's claims are not preempted because MLB, the option originally chosen by COT, was not covered by the tariff. Although the magistrate judge ruled that MLB was not a tariffed service, that

decision is irrelevant to the result here. If the majority and the magistrate judge correctly identify MLB as a non-tariffed service, then *Kirby* dictates that AT&T was prohibited from entering into that agreement and it is now invalid. If, as AT&T claims, MLB was a tariffed service, then the filed-rate doctrine prohibits COT's state law claims. In either case, COT has no state-law claims against AT&T for MLB service.

The majority utilizes AT&T's expert testimony to conclude that neither the billing procedures nor the provision of SDN services were covered by the tariff. Again, this is of no import. If those service were not covered by the tariff, the agreements were invalid and COT cannot now attempt to enforce them. If they were tariffed, they are preempted by the filed-rate doctrine.

While the filed-rate doctrine may create harsh consequences in some instances, the Supreme Court has consistently adhered to it because of the overarching policy of the Act, namely, prevention of discrimination. *See Maislin*, 497 U.S. at 128. Accordingly, a court is required to ignore allegations of fraud or other inequitable conduct in determining whether to apply the doctrine. "Rather, the focus for determining whether the filed rate doctrine applies is the impact the court's decision will have on agency procedures and rate determinations." *H.J. Inc. v. Northwestern Bell Tel. Co.*, 954 F.2d 485, 489 (8th Cir.), *cert. denied*, 504 U.S. 957 (1992). An examination of the filed tariff at issue, AT&T Tariff F.C.C. No. 1, proves instructive for this purpose.

Initially, the tariff sets forth the provisioning standards for establishing and confirming a due date when an order for SDN service is placed. In addition, AT&T must "make every reasonable effort to assure" that it is delivered on time, but if there is a delay in excess of 45 days, "the Customer may cancel the order without penalty or payment or nonrecurring charges." (§ 2.5.10.B). Under the

tariff, the customer is responsible for payment of bills, except for the Location Account Billing Option, to which COT did not subscribe. For that option, AT&T "is not responsible for the way the Customer may allocate usage or charges among multiple Users." (§ 6.2.4).

For calling cards, the tariff provides that "[c]alls charged to a Local Exchange Company Calling Card or an AT&T Card will . . . be included on the LDMTS bill for the Main Billed Account with which the card is associated." (§ 2.5.12.B). The tariff also delineates deposit provisions for customers who have a "proven history of late payments . . . or whose financial responsibility is not a matter of record." It requires those customers to "make a deposit to be held as a guarantee for the payment of charges." (§ 2.5.6.A).

The tariff's service provision states that "Custom Network Services are fully supported by the Company through engineering, installation and maintenance efforts. The Company will assure that each service functions properly within its specified transmission and switching parameters." (§ 6.2.5). "When installation of a component is required it will be installed subject to the availability of installation personnel and equipment." (§ 6.2.5.B).

As these excerpts illustrate, the tariff is an exhaustive document, covering numerous types of service and contingencies between AT&T and its customers. The above-cited sections are material to COT's claims concerning delay and provisioning and its claims should have been addressed by looking to the tariff's provisions in the context of the Communications Act.

AT&T adopts this position, arguing that the filed-rate doctrine preempts COT's claims because COT is seeking to enforce a contract for services not provided for in the tariff. COT is therefore impermissibly seeking "an advantage or preference not open to all and not provided for in the published tariffs." *Kirby*, 225 U.S. at 166.

As noted earlier, COT counters that the filed-rate doctrine does not apply because COT was not demanding better service for the tariffed rate. Instead, COT argues that "while COT paid the same rates as AT&T's favored corporate customers, COT was given inferior SDN service and denied SDN features that were provided to AT&T's favored customers." However, if this truly were COTs claim, its remedy was to bring a suit for discrimination under 47 U.S.C. §§ 202, 206, and 207.[1]

COT also argued that "it is elementary" that the filed-rate doctrine does not apply to untariffed services, or in other words, that common-law applies to fill in gaps left in tariffs. The majority accepts this contention. However, none of the three cases cited by COT support this "elementary" proposition. *MCI v. Credit Builders of Am., Inc.*, 980 F.2d 1021, 1022-23 (5th Cir.), *vacated*, 508 U.S. 957, *reinstated*, 2 F.3d 103, *cert. denied*, 510 U.S. 978 (1993), holds only that a carrier's suit to collect unpaid tariffed charges does not "arise under" federal law within the meaning of 28 U.S.C. §§ 1331 and 1337. This holding is irrelevant to this case.[2] *Security Servs. Inc. v. K Mart Corp.*, 511 U.S. 431, 114 S. Ct. 1702, 1710 (1994), held only that a carrier cannot base a rate collection action on a tariff that is void. This is also inapplicable here.

Finally, *US Wats, Inc. v. AT&T*, No. Civ.A 93-1038, 1994 WL 116009 (E.D.Pa. Apr. 5, 1994), comes closest to supporting COT's proposition. There, the district court

[1] On October 22, 1993, eight months after the discovery cut-off and long after the two-year statute of limitations had run (*see* 47 U.S.C. § 415), COT sought leave to filed a second amended complaint to add a claim that AT&T had engaged in discrimination against resellers in violation of § 202. The magistrate denied COT leave to file this amended complaint and COT does not appeal from this ruling.

[2] In any event, Ninth Circuit case-law holds the contrary position. *Sea-Land Serv. Inc. v. Murrey & Son's Co.*, 824 F.2d 740, 744 (9th Cir. 1987).

rejected AT&T's argument that the filed-rate doctrine preempted the plaintiff's breach of contract claim for refusing to transfer end users from one SDN to another because such a claim "will neither result in rate discrimination nor embroil the court in a dispute over the reasonableness of AT&T's charges in contravention of the FCC's ratemaking authority." *Id.* at *5.[3] Under *US Wats*, COTs claims are viable only if they would not result in rate discrimination.[4]

In footnote number 9, the majority cites *Kirby, Davis* and *Atchison* to refute AT&T's argument that "the filed-rate doctrine precludes a carrier from entering into 'side-deals' which give preference to certain customers and are not defined in the filed-rates." However, these cases all dealt with service provisions that were not specified in the tariff. It was *precisely because* the service provisions were not included in the tariff that the Supreme Court held that they were not enforceable as a matter of contract law.

COT also argues that the "savings clause" of 47 U.S.C. § 414 preserves its state-law claims. That section states: "Nothing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in

[3] In addition, it is arguable that *US Wats* was incorrectly decided because the plaintiff in that case should have properly brought a claim for discrimination under § 202(a) or unreasonable practices under § 201 rather than a claim for breach of contract.

[4] The two claims that went to trial—breach of contract and tortious interference with COT's contracts with its customers—both dealt with AT&T's alleged failure to provide SDN service in accordance with its "contract" with COT. This contract consisted of the tariff plus any oral or written statements not inconsistent with the tariff. Among other claims, COT alleged that AT&T breached the contract by failing to allocate properly the discounts between COT and its customers under Multilocation Billing, and by failing to provide SDN and MLCP services that were "functional" for COT. These claims either allege that AT&T failed to provide service according to the tariff, or are seeking to obtain services according to procedures that are not provided for in the tariff. Either way, COT's claims are preempted.

addition to such remedies." Initially, it is important to note that the Interstate Commerce Act contained an identical savings clause at the time of the Supreme Court's decision in *Kirby*. *See* 49 U.S.C. § 22.

In *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), the plaintiff brought a common-law state action arguing that a shipper's published rates were unreasonable and discriminatory. *Id.* at 430. The Court held the action to be preempted despite the savings clause. *Id.* at 446. As later described in *Nader v. Allegheny Airlines*, 426 U.S. 290, 298-99 (1976), the *Abilene Cotton* Court "found that the continuance of private damages actions attacking the reasonableness of rates subject to the regulation of the Interstate Commerce Commission would destroy the purpose of the Interstate Commerce Act, which was to eliminate discrimination by requiring uniform rates."

In *Nader*, the plaintiff brought a common-law action against an airline seeking damages sustained as a result of its overbooking practices. 426 U.S. at 292-93. The Court, distinguishing *Abilene Cotton*, concluded that the action was not preempted because the Court was not being called upon to make a determination of the reasonableness of a rate or practice that could be contrary to the regulatory agency's decision. *Id.* at 299. Any impact on rates, reasoned the Court, "would be merely incidental." *Id.* at 300.

In *Cooperative Communications, Inc. v. AT&T*, 867 F. Supp. 1511 (D.Utah 1994), an aggregator brought suit against AT&T. The district court held that the savings clause "preserves causes of action for breaches of duties distinguishable from those created under the Act." *Id.* at 1516. In other words, "state-law remedies which do not interfere with the Federal government's authority over interstate telephone charges or services, and which do not otherwise conflict with an express provision of the Act, are preserved by section 414." *Id.* (quoting *Kellerman v.*

MCI, 493 N.E.2d 1045, 1051, *cert. denied*, 479 U.S. 949 (1986)). The plaintiff alleged that AT&T attempted to drive it out of business by making intentional misrepresentations to the plaintiff's clients, by misappropriating plaintiff's confidential client billing information, and by attempting to destroy plaintiff's customer base. *Id.* at 1514. The court held the claims based on these allegations were not preempted. *Id.* at 1516.

Cooperative Communications is distinguishable because it did not involve a relationship between AT&T and its customer and did not implicate AT&T's duties under § 203. Because COT's claims seek better (or different) service than is published in AT&T's tariff, the savings clause does not save COT's claims. As in *Kirby*, the plaintiff's claims interfere with the purpose of the Act because they seek treatment that is different from the published tariff.

COT also argues that even if the filed-rate doctrine applies, its state-law claims remain viable because it was required to prove, in accordance with the tariff, that AT&T engaged in "willful misconduct." The tariff provides that the "Company's liability, if any, for its willful misconduct is not limited by this tariff." (§ 2.3.1.A.) AT&T argues that COT's claims are nevertheless preempted because the "willful conduct" consisted of willfully failing "to implement the very alleged side deals that are illegal and that would have given COT illegal preferences over other similarly-situated customers (i.e. resellers)."

AT&T's argument is supported by Supreme Court precedent. In *Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. 94 (1915), the Court held that a passenger who purchased a train ticket at a rate misquoted by the ticket agent did not have a defense against the subsequent collection of the higher tariff rate by the railroad. As described by the Court in *Maislin*, the *Maxwell* Court's approach "was deemed necessary to prevent carriers from intentionally 'misquoting' rates to shippers as a means of offering them rebates or discounts." 497 U.S. at 127.

That AT&T willfully broke its "agreements" with COT should not alter the *Kirby* preemption analysis. If it could, the *Kirby* approach to the filed-rate doctrine would be rendered a nullity. That the tariff did not limit AT&T's liability for "willful misconduct" does not mean that COT should not still have to pursue damages for such misconduct through §§ 202, 206 and 207 of the Act.

C. *Conclusion*

The outcome that I advocate may appear inequitable. I share the majority's concerns about AT&T's conduct in its dealing with COT. However, the Supreme Court has consistently ruled that the filed-rate doctrine's precepts outweigh any equitable issues. We may question the wisdom of the filed-rate doctrine, but it is the law of the land. *See MCI*, 114 S. Ct. at 2233. ("[O]ur estimations . . . of desirable policy cannot alter the meaning of the Federal Communications Act of 1934.")

I dissent because the majority's decision is a significant one. The result will allow COT to conduct another trial, where it will present evidence about how badly AT&T treated it and in which the only determination for the jury will be the amount of punitive damages to award to COT. Although this would be the correct disposition if COT's claims were not preempted, I believe that the filed-rate doctrine bars those claims. Therefore, I dissent.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 91-1236-JE

CENTRAL OFFICE TELEPHONE, INC.,
Plaintiff,

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY,
Defendant.

OPINION

JELDERKS, Magistrate Judge:

Plaintiff Central Office Telephone, Inc. (COT) brought this action against American Telephone and Telegraph Company (AT&T). AT&T denied liability, and brought a counterclaim against COT. COT's claims for breach of contract and intentional interference with business relations were tried to a jury, which found in COT's favor and awarded damages in the amount of $13,000,000. The jury also found in COT's favor on AT&T's counterclaim.

AT&T now moves for judgment as a matter of law, for a new trial, or for remittitur. I deny the motion for remittitur, and grant in part and deny in part the motion for judgment as a matter of law. Pursuant to Fed. R. Civ. P. 50(c), I conditionally deny AT&T's motion for a new trial. For the reasons set forth below, I am entering an amended judgment reducing COT's award to $1,154,000.

BACKGROUND

The background of this action is fully set forth in Findings and Recommendations and Opinions issued earlier, and will be set out only briefly here.

COT, an Oregon corporation, resells communications services provided through other companies, formerly including defendant AT&T. This action concerns AT&T's provision of a service known as the "Software Defined Network" (SDN). SDN is a form of long distance service that AT&T provides to certain large customers, who receive volume discounts by subscribing to purchase large blocks of communication time. Customers who do not need all of the purchased time may resell unused portions to other users. Independent businesses like COT can also resell SDN services by aggregating smaller customers who alone do not use enough long distance services to qualify for volume discounts. COT sought to realize profits by retaining a portion of the large-user discount for itself, and passing on a portion of the discount to its "aggregated' customers.

COT initially contracted for AT&T's SDN services in October 1989, and entered into a second contract for SDN services in April 1990. At trial, COT presented considerable evidence that it experienced serious delays and errors in provisioning and billing soon after it began selling SDN services to its customers. COT's sales of AT&T's SDN services rose from February 1990 through August 1990. They subsequently declined rapidly, at least in part because COT salespersons more actively promoted sales of the services of other carriers, especially Sprint, because of delays in receiving commissions on SDN sales.

In a letter dated September 17, 1992, COT informed AT&T that it wished to be disconnected from SDN, and that it would not pay for any usage charges that might be incurred after September 30, 1992. At trial, COT personnel testified that COT discontinued sale of SDN because

of the problems it experienced with provisioning and billing of the SDN services. COT had alleged earlier, however, and one of its witnesses testified at trial, that COT stopped selling SDN at that time at least in part because of SDN price increases.

COT's claims for breach of contract and intentional interference with prospective business advantage were tried to the jury, which was instructed that it could award damages only if it found that AT&T had engaged in willful misconduct. The jury determined that COT should recover $13,000,000 to compensate for profits lost until the year 2000. That amount was one of three possible total damage figures offered by Mr. Hainline, COT's damages expert. Hainline testified that one of his calculations showed "approximately 13 million" in past and future profits that COT would have realized "absent difficulties" with the provision and billing of SDN services. Another of Hainline's calculations showed total lost past and future profits of approximately $17,500,000. Hainline later testified that this figure should be reduced to account for a number of variables, and that the "appropriate combined damage number" was $14,500,000.

STANDARDS

1. *Motion for a New Trial*

The court must grant a motion for a new trial if it concludes that the verdict is against the clear weight of the evidence. *Landes Const. Co., Inc. v. Royal Bank of Canada*, 833 F.2d 1365, 1372 (9th Cir. 1987); *Fenner v. Dependable Trucking Co.*, 716 F.2d 598, 602 (9th Cir. 1983). The court can weigh the evidence and assess the credibility of the witnesses, and is not required to view the evidence from the perspective most favorable to the prevailing party. *Landes Const.*, 833 F.2d at 1371.

A motion for a new trial is properly granted when the court concludes that the jury has reached a seriously erroneous result, *Digidyne Corp. v. Data General Corp.*,

734 F.2d 1336, 1347 (9th Cir. 1984), *cert. denied*, 473 U.S. 908 (1985), or when a new trial is necessary to avoid a miscarriage of justice. *Hanson v. Shell Oil Co.*, 541 F.2d 1352, 1359 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977). A motion for a new trial may also be granted where substantial errors were made in admission of evidence or jury instructions. *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251 (1940).

2. *Remittitur*

Remittitur is available to correct excessive verdicts. *See Fenner*, 716 F.2d at 603 n. 3. A trial court reviewing a damage award attacked by a defendant as excessive must consider the evidence of damages in a light most favorable to the prevailing party. *Seymour v. Summa Vista Cinema, Inc.*, 809 F.2d 1385, 1387 (9th Cir. 1987).

If it concludes that a damages award is excessive, the court may either grant the defendant's motion for a new trial, or deny the motion, conditioned upon the prevailing party's acceptance of a remittitur. *Id.* A trial court granting a motion for remittitur does not substitute its judgment for that of the jury, but instead reduces the judgment to the maximum amount sustainable by the proof. *D & S Redi-Mix v. Sierra Redi-Mix & Contracting Co.*, 692 F.2d 1245 (9th Cir. 1982), *citing Ogilvie v. Fotomat Corp.*, 641 F.2d 581, 586 (8th Cir. 1981); *Keye v. Lauga*, 635 F.2d 330 (5th Cir. 1981); *Bonura v. Sea Land Service, Inc.*, 505 F.2d 665, 669 (5th Cir. 1974). A prevailing party that has accepted a remittitur cannot challenge the remittitur on appeal or cross appeal. *999 v. C.I.T. Corp.*, 776 F.2d 866, 873 (9th Cir. 1985), *citing S. Birch & Sons v. Martin*, 244 F.2d 556, 560 (9th Cir.), *cert. denied*, 355 U.S. 837 (1957).

3. *Motion for Judgment as a Matter of Law*

A party is entitled to judgment as a matter of law, formerly known as a judgment notwithstanding the verdict

(JNOV), if the evidence, viewed with all reasonable inferences taken in favor of the nonmoving party, does not support the verdict. *See, e.g., Los Angeles Memorial Coliseum Comm'n v. National Football League*, 726 F.2d 1381, 1387 (9th Cir.), *cert. denied*, 469 (1984). If the jury verdict is supported by substantial evidence, the court cannot weigh the evidence or substitute its judgment for that of the jury. *Jeanery, Inc. v. James Jeans, Inc.*, 849 F.2d 1148, 1151 (9th Cir. 1988). A motion for judgment as a matter of law should be granted if, without considering the credibility of the witnesses, the evidence and inferences that may be drawn from it, viewed most favorably for the nonmoving party, can support only the conclusion that the moving party is entitled to judgment. *Id.* A motion for judgment as a matter of law should not be granted if reasonable minds could differ over the verdict. *United States v. Callahan*, 884 F.2d 1180, 1183 (9th Cir. 1989), *cert. denied*, 493 U.S. 1094 (1990).

DISCUSSION

Before turning to the basis for my decision to grant in part AT&T's motion for judgment as a matter of law and to enter an amended judgment, I will briefly discuss why I have concluded that a new trial or remittitur are not appropriate.

1. *Motion for New Trial*

As noted above, a motion for a new trial is properly granted only if the verdict is against the clear weight of the evidence, where a new trial is necessary to avoid a miscarriage of justice, or where substantial errors were made in admission of evidence or jury instructions. Here, after carefully reviewing the parties' arguments and studying substantial portions of the trial transcript, I have concluded that I erred in allowing the juy to award damages for any period of time after COT terminated its relationship with AT&T. I am satisfied, however, that sufficient evidence supported the jury's conclusions as to

liability on COT's claims and AT&T's counterclaim. Though it presents a close question, I have also concluded that sufficient evidence supported the jury's award of damages up to the time COT discontinued its sale of SDN services.[1] I am likewise satisfied that, except for my error in not striking damage testimony related to the post-September 1992 period, there were no substantial errors in the admission of evidence to mislead the jury. Further, except for allowing the jury to allocate damages for the post-September 1992 period, I do not think that my instructions were incorrect.

If a party seeking judgment as a matter of law also moves for a new trial, Fed. R. Civ. P. 50(c) requires a court granting a motion for judgment as a matter of law to determine whether a new trial should be granted if the judgment is later vacated or reversed. Pursuant to this rule, I conditionally deny AT&T's motion for a new trial. If an appellate court concludes that I erred in granting in part AT&T's motion for judgment as a matter of law, the $13,000,000 jury verdict should stand. If my original decision to submit the issue of post-September 1992 damages to the jury on the evidence presented had been correct, the award would not be against the clear weight of the evidence or the product of erroneous evidentiary rulings and instructions.

2. *Remittitur*

In granting a remittitur, the court reduces the judgment to the maximum amount that is supported by the evidence. My reduction of the judgment here does not reflect a conclusion that the jury award was excessive, as that term is used in the context of remittitur. As discussed below, whether COT's evidence and methodology are sufficient for the period of time before COT stopped purchasing and reselling SDN services in September 1992. I therefore am not amending the judgment to reduce the damages as a remittitur. Instead, I am reducing the judgment to correspond to only that peiod of time for which I should have allowed the jury to consider awarding damages. The amended judgment provides COT a full recovery of the amount awarded by the jury through September 1992, when COT discontinued sale of SDN services. As discussed below, I erred, as a matter of law, in allowing the jury to consider and to award damages beyond that date.

[1] Because the damages that the jury awarded for that period are discernable from the record, the proper remedy for my error is not the granting of a new trial on the damages question, but a reduction of the damages to the pre-termination amount.

3. *Judgment as a Matter of Law*

a. *Filed Tariffs and Federal Communications Act (FCA) preemption*

AT&T contends that it is entitled to judgment as a matter of law because "[t]he filed tariffs doctrine and the comprehensive scheme of the Federal Communications Act bar COT's claims." It argues that COT's breach of contract claim related to only "matters governed by filed tariffs," and that those tariffs preempted "state law contract claims." AT&T further argues that COT's tort claim is "cognizable under," and preempted by, the Federal Communications Act. It also contends that, even if COT's claims were not preempted, I improperly instructed the jury that it could look outside the tariffs to determine the terms and conditions of the parties' agreement.

I need not address these arguments at length here. The parties' respective positions on the filed tariff doctrine were extensively briefed and argued throughout the course of this litigation. I remain convinced that the critical conduct here was largely outside the scope of the tariffs. As I noted in an opinion filed on December 8, 1993, COT challenged not the reasonableness or validity of the filed rate—issues properly subject to the filed rate doctrine—but the manner in which AT&T provided its services. In

addition, Multi Location Billing (MLB), a subject of considerable contention in this dispute, is an untariffed service that is subject to a separate agreement between the parties.

I also remain convinced that the jury was properly instructed as to how it should determine the parties' rights and obligations. The jury was instructed that those rights and obligations were controlled by the terms of any applicable tariffs, and that the parties could make no agreements contrary to the tariffs. The jury was likewise instructed, consistently with the tariffs, that AT&T could be liable only for willful misconduct

b. *Damages*

In calculating COT's damages, Hainline established as a base line for COT's SDN sales the seven-month period between February and August 1990. Hainline determined that SDN monthly sales averaged $17,805 during that period, and chose that particular time because sales of SDN subsequently dropped rapidly. Using a trend line based upon sales of SDN during the base period he had selected, Hainline started from a monthly base sales total of $67,355 for April 1990, and added increments of $17,805 to that amount for each of the next six months. He increased the projected monthly growth to $25,000 for each month in the subsequent six-month period, and ultimately projected that, with the addition of new salespersons, sales of SDN would have increased another $35,000 per month during a later period. Hainline hypothesized that, but for AT&T's failure to properly deliver SDN services, COT would have realized gross revenues of $15,342,000 through September 1992. Hainline calculated the lost profits associated with those lost revenues as $1,154,000. He calculated that COT's inability to market SDN cost the company another $28,200,000 in lost revenue, representing lost profits of $2,971,000, between September 1992 and April 1994. Applying the same methodology, with some minor modifications, Hainline calculated that COT lost an additional $9,088,800 between April 1994 and the year 2000. Hainline based his trial testimony that COT lost profits of "approximately 13 million" on a totalling of the lost profits from those three periods. The jury's verdict of $13,000,000 is obviously based upon that total.

During the trial, AT&T moved to strike Hainline's damages analysis on a number of grounds. I had serious reservations about COT's lost profits evidence, and about the appropriateness of allowing the jury to award damages for projected lost future profits beyond the time when COT terminated its relationship with AT&T. A thorough review of the trial testimony and exhibits related to damages has only reinforced my concerns. The following are some of the problems with COT's damages evidence:

(1) Hainline– lacked important information about COT's sales force. He did not know, for example, what COT sales people did after August 1990, and speculated that the sales force might have stopped selling communications services after COT began having problems with SDN provisioning and billing. COT's sales force did not in fact disappear, but continued to sell communications services obtained primarily through Sprint. In addition, Hainline concluded that COT could support 10 sales people—six more than it actually employed—and assumed that these additional persons would sell at the same rate as the then existing sales persons. These projections are simply assumptions for which I find no evidence other than Hainline's opinion. Certainly, Hainline was qualified to testify as an expert on certain matters. Even experts, however, must have some objective and verifiable basis for their opinions.

(2) Though he testified that he had "implicitly given an effect to bad debts," Hainline testified that he did not make any specific allowance for the failure of some customers to pay their bills. Hainline said that he assumed that bad debts would "not exceed the additional costs that

COT had incurred," an apparent reference to costs associated with past billing problems. He did not, however, offer a basis for that assumption.

(3) Though SDN and other communications services are based upon a complex and changing technology, Hainline made no allowances for the possibility that SDN's value, marketability, and profitability might be seriously affected by technological changes before the year 2000. Instead, with no apparent basis within his own area of expertise, Hainline simply concluded that it "did not seem unreasonable . . . that there was 5-1/2 years left on the technology. . . ."

(4) Hainline erroneously assumed that COT had intended to stay with MLB throughout the time it planned to market SDN. Gordon Rood, COT's president, testified that COT had always intended to do its own billing after it had grown.

(5) In calculating lost profits, Hainline assumed that the discount levels—the rate reductions that COT shared with its customers—would stay constant until the year 2000. He did not know the current SDN discount level or rates per minute at the time of trial, and was unaware that, under the applicable tariffs, AT&T could change the discount levels on 14 days notice.

(6) In conducting his damage study, Hainline did not talk to any of COT's customers or to any other resellers. Nothing in his testimony or in the exhibits he prepared indicates that he accounted for the possibility that the substantial profits he projected for COT would attract competition that could reasonably be expected to ultimately reduce COT's sales and profits.

(7) Hainline testified that his projections of lost future sales and profits was based upon his understanding that SDN was a unique product, superior to any competing services. He also testified, however, that he had not studied the features or costs of the services offered by MCI and Sprint, and that he had not examined the time it generally took to provision a customer who had chosen Sprint instead of AT&T. His conclusion that SDN was a "unique product in a unique market" therefore lacks sufficient foundation. Hainline's assumptions as to the uniquely appealing characteristics of SDN appear to be inconsistent with Rood's testimony that, after a certain date, COT's salespersons would, in the vast majority of cases, sign up customers on Sprint instead of AT&T. COT's ability to sell Sprint to customers who otherwise might have purchased SDN seriously undermines the contention that AT&T's product was "unique" as that term is generally understood when a reseller asserts an injury based upon a supplier's failure to deliver.

Hainline's failure to carefully examine services available for resale from AT&T's competitors is significant. A reseller can recover profits lost as a result of a supplier's failure to deliver only if it cannot obtain substitute performance from another supplier. *See Calbag Metals Co. v. Guy F. Atkinson Co.*, 95 Or. App. 514, 518-519, 770 P.2d 600, 602-603 (1989); *United Engine Parts, Inc. v. Ried*, 283 Or. 421, 432, 584 P.2d 275 (1978); *Consolidated Data Terminals v. Applied Digital Data Sys.*, 708 F.2d 385, 394-395 (9th Cir. 1983). Here, Hainline's analysis failed to acknowledge or account for the fact that, as COT's sales of SDN decreased, its sales of Sprint increased.

(8) Hainline's study assumed that, once COT no longer sold SDN services, all profits that it might have realized through selling SDN were "lost." This assumption was incorrect because it failed to account for profits COT might realize by selling services obtained from AT&T's competitors. COT clearly has continued in business. That being the case, one can only rationally assume that at least some of the efforts that the company might otherwise have expended in marketing SDN and servicing its SDN ac-

counts have been diverted to reselling and servicing accounts using services of AT&T's competitors.

(9) AT&T provides SDN services in a heavily regulated industry, and is required to provide its services to customers such as COT on a nondiscriminatory basis. In projecting more than seven years of lost profits based upon the termination of the parties' relationship, Hainline did not consider whether the problems which caused COT to terminate its sales of SDN in 1992 still existed by the time the contracts were otherwise scheduled to terminate,[2] and whether those problems could reasonably be expected to exist until the year 2000. This is significant, because it appears that, if COT sought to again purchase those services, AT&T would have an ongoing legal obligation to furnish SDN services to COT for resale on the same terms and conditions that it provides SDN to other customers.

To briefly summarize, Hainline projected nearly 10 years of lost profits based upon only a few months of actual sales. Hainline is not an expert in the complex field of communications technology, and he failed to consider price changes, changes in provisioning delays, AT&T's obligation to provide SDN on a nondiscriminatory basis, the availability of substitute products, or the fact that COT sold other products to customers who otherwise might have purchased SDN.

Damage calculations must be based upon reasonable assumptions, and must be consistent with real business

[2] Rood testified that COT salespersons would have preferred to sell SDN rather than Sprint, but had to sell Sprint because SDN was not provided on a timely basis. Curiously, Rood was unaware of how long it normally took to provision COT customers purchasing SDN by the time COT terminated its relationship with AT&T. AT&T presented evidence at trial that it was provisioning SDN customers within 30 to 40 days by September 1992, and Rood testified that he thought that that interval, if achieved, would have met AT&T's obligation.

conditions. *See, e.g., Murphy Tugboat Co. v. Crowley*, 658 F.2d 1256, 1262 (9th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982). Though it is a close question, I have concluded that Hainline's study is sufficiently grounded in objectively verifiable facts and reasonable assumptions to support the jury's award of lost past profits up to COT's termination of its SDN sales in September 1992. It clearly is not sufficient, however, to support more than seven years of lost profits beyond that point. The huge lost profits Hainline projected simply cannot, under the facts in evidence in this action, rest on so narrow a base.

As noted above, a party is entitled to judgment as a matter of law if the evidence, viewed with all reasonable inferences taken in favor of the nonmoving party, does not support the verdict. Here, drawing all reasonable inference in COT's favor, the evidence would support only the conclusion that COT is not entitled to recover damages for the period following its termination of its agreements with AT&T. Beyond that point the evidence of damages became simply too speculative and attenuated, and COT's contention that it was entitled to further recovery is legally untenable. As a matter of law, I should have stricken evidence of the post-September 1992 period, and should not have allowed the jury to consider awarding damages past that time.

In concluding that I should have stricken this evidence, I am mindful that a plaintiff is not required to prove the amount of damages incurred with mathematical certainty, but instead "need only establish the fact of damages and evidence from which a satisfactory conclusion as to the amount of damages can be reached." *North Pacific Lumber v. Moore*, 275 Or 359, 366, 551 P.2d 431 (1976). Given that SDN is a complex technology sold in a competitive and changing market, at varying prices, the evidence COT produced could not allow a "satisfactory conclusion" as to the amount of damages, if any, actually incurred after September 1992.

My conclusion that COT cannot recover for the post-September 1992 period is based in part upon the speculative nature of the evidence of lost profits past that point, and upon the lack of support for many of the critical assumptions made by COT's damages expert. It is also based upon the legal requirement, noted above, that a seller in COT's position demonstrate that substitute sources of supply were not available,[3] and upon COT's failure to establish that AT&T was not materially performing by that time. In arguing that it is entitled to recover damages until the year 2000, COT relies upon Oregon cases stating that, following a total breach of contract, a non-defaulting party may consider the contract terminated and bring an action for damages. *See Mohr v. Lear*, 239 Or. 41, 395 P.2d 117 (1964); *Krebs Hop Co. v. Livesley*, 59 Or. 574, 114 P. 944 (1911). This reliance is misplaced. As the *Mohr* court noted, an action for damages grounded upon repudiation or total breach must be based upon conduct motivated by a "positive, definite, absolute, unconditional and unequivocal intent evincing a fixed purpose not to perform in any event." *Mohr*, 239 Or at 49. In the present action, the evidence admitted at trial would not support the conclusion that AT&T was demonstrating an unequivocal intent not to perform at the time COT terminated its sale of SDN. Instead, the evidence would support only the conclusion that AT&T had corrected, or was in the process of correcting, problems with provisioning of its SDN services. Certainly, given the

[3] Because COT was selling Sprint services before September 1992, this conclusion could lead one to question my decision to allow the verdict to stand up to that period. I have concluded that the verdict should stand to that point because the jury could reasonably have concluded that problems with SDN provisioning and billing seriously disrupted COT's operations, and reduced its profits in the amount represented by the portion of the $13,000,000 award related to that period. The jury could reasonably have concluded that, until COT terminated its purchase of SDN, AT&T both interfered with its prospective business advantage, and failed to meet its contractual obligation to furnish a "functional" SDN.

significant problems that COT had encountered regarding SDN, the jury could have reasonably concluded that COT was entitled to discontinue its relationship with AT&T without penalty, and that it was entitled to recover past lost profits caused by AT&T's breach of contract and interference with COT's prospective business advantage. The jury's conclusion that COT was not liable on AT&T's counterclaim was also supported by the evidence. As a matter of law, however, COT could not, under these circumstances, terminate the contract and continue to recover damages for more than seven additional years.

CONCLUSION

I deny AT&T's motion for remittitur (#448-3). I grant in part and deny in part AT&T's motion for judgment as a matter of law (#448-1), and will enter an amended judgment in the amount of $1,154,000. Pursuant to Fed. R. Civ. P. 50(c), I conditionally deny AT&T's alternative motion for a new trial (#448-2).

DATED this 9th day of November, 1994.

/s/ John Jelderks
JOHN JELDERKS
United States Magistrate Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 91-1236-JE

CENTRAL OFFICE TELEPHONE, INC.,
Plaintiff,

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY,
Defendant.

ORDER

JELDERKS, Magistrate Judge:

Defendant AT&T's motion for remittitur (#448-3) is DENIED. Defendant AT&T's motion for judgment as a matter of law (#448-1) is GRANTED in part and DENIED in part, and an amended judgment in the amount of $1,154,000 will be entered. AT&T's alternative motion for a new trial (#448-2) is conditionally DENIED pursuant to Fed. R. Civ. P. 50(c).

DATED this 9th day of November, 1994.

/s/ John Jelderks
JOHN JELDERKS
United States Magistrate Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 91-1236-JE

CENTRAL OFFICE TELEPHONE, INC.,
Plaintiff,

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY,
Defendant.

AMENDED JUDGMENT

Based on the record,

IT IS HEREBY ORDERED that the judgment entered on July 1, 1994 is amended. Judgment in the amount of $1,154,000 is entered in favor of plaintiff. Interest shall accrue on this amount commencing July 1, 1994.

DATED this 9th day of November, 1994.

/s/ John Jelderks
JOHN JELDERKS
U.S. Magistrate Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 91-1236 JE

CENTRAL OFFICE TELEPHONE, INC.,
Plaintiff,

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY,

FINAL JUDGMENT

This action came on for trial before the Court and a jury, the Honorable John A. Jelderks, United States Magistrate Judge, presiding, and the issues having been duly tried and a jury having duly rendered its verdict,

IT IS ORDERED AND ADJUDGED

That the Plaintiff, Central Office Telephone, Inc., recover from the Defendant, American Telephone & Telegraph Company, the sum of THIRTEEN MILLION DOLLARS ($13,000,000), with post-judgment interest thereon compounded annually at the federal interest rate of five and thirty-one hundredths percent (5.31%); and

That the Defendant take nothing on its counterclaim, and that the counterclaim is dismissed on the merits; and

That the Plaintiff recover the costs of this action.

DATED at Portland, Oregon, this 1st day of July, 1994.

/s/ John Jelderks
THE HONORABLE JOHN A. JERDERKS
United States Magistrate Judge

APPENDIX E

[Filed Jul. 18, 1997]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 94-36116; 94-36156
D.C. NO. CV-91-1236-JAJ

CENTRAL OFFICE TELEPHONE, INC.,
Plaintiff-Appellee and
Cross-Appellant,

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY,
Defendant-Appellant
and Cross-Appellee.

Before: FERGUSON and BRUNETTI, Circuit Judges, and KING,* District Judge.

Judge Ferguson and Judge King have voted to deny the petition for rehearing. Judge Brunetti has voted to grant the petition for rehearing. Judge King has voted to reject the suggestion for rehearing en banc, Judge Ferguson has recommended rejection of the suggestion for rehearing en banc. Judge Brunetti has voted to accept the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion and no active judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

*** Hon. Samuel P. King, Senior United States District Judge for the District of Hawaii sitting by designation.**

APPENDIX F

COMMUNICATIONS ACT (47 U.S.C. §§ 151, ET SEQ.)

§ 201. Service and charges (47 U.S.C. § 201)

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: *Provided*, That communications by wire or radio subject to this chapter may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: *Provided further*, That nothing in this chapter or in any other provision of law shall be construed to prevent a common carrier subject to this chapter from entering into or operating under any contract with any common carrier not subject to this chapter, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: *Provided further*, That nothing in this chapter or in any other provision of law shall prevent a common carrier subject to this chapter from furnishing reports of positions of ships at sea to newspapers of gen-

eral circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.

§ 202. Discrimination and preferences (47 U.S.C. § 202)

(a) Charges, services, etc.

It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

(b) Charges or services included

Charges or services, whenever referred to in this chapter, include charges for, or services in connection with, the use of common carrier lines of communication, whether derived from wire or radio facilities, in chain broadcasting or incidental to radio communications of any kind.

(c) Penalty

Any carrier who knowingly violates the provisions of this section shall forfeit to the United States the sum of $6,000 for each such offense and $300 for each and every day of the continuance of such offense.

§ 203. Schedules of charges (47 U.S.C. § 203)

(a) Filing; public display

Every common carrier, except connecting carriers, shall, within such reasonable time as the Commission shall designate, file with the Commission and print and keep open for public inspection schedules showing all charges for itself and its connecting carriers for interstate and foreign wire or radio communication between the different points on its own system, and between points on its own system and points on the system of its connecting carriers or points on the system of any other carrier subject to this chapter when a through route has been established, whether such charges are joint or separate, and showing the classifications, practices, and regulations affecting such charges. Such schedules shall contain such other information, and be printed in such form, and be posted and kept open for public inspection in such places, as the Commission may by regulation require, and each such schedule shall give notice of its effective date; and such common carrier shall furnish such schedules to each of its connecting carriers, and such connecting carriers shall keep such schedules open for inspection in such public places as the Commission may require.

(b) Changes in schedule; discretion of Commission to modify requirements

(1) No change shall be made in the charges, classifications, regulations, or practices which have been so filed and published except after one hundred and twenty days notice to the Commission and to the public, which shall be published in such form and contain such information as the Commission may by regulations prescribe.

(2) The Commission may, in its discretion and for good cause shown, modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or

conditions except that the Commission may not require the notice period specified in paragraph (1) to be more than one hundred and twenty days.

(c) Overcharges and rebates

No carrier, unless otherwise provided by or under authority of this chapter, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this chapter and with the regulations made thereunder; and no carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule.

(d) Rejection or refusal

The Commission may reject and refuse to file any schedule entered for filing which does not provide and give lawful notice of its effective date. Any schedule so rejected by the Commission shall be void and its use shall be unlawful.

(e) Penalty for violations

In case of failure or refusal on the part of any carrier to comply with the provisions of this section or of any regulation or order made by the Commission thereunder, such carrier shall forfeit to the United States the sum of $6,000 for each such offense, and $300 for each and every day of the continuance of such offense.

APPENDIX G

EXCERPTS FROM AT&T COMMUNICATIONS, INC. TARIFF F.C.C. NO. 1

(5th Revised Page 23
Effective: December 2, 1986)

2.3. RESPONSIBILITIES OF THE COMPANY

2.3.1. Liability

A. The Company's liability, if any, for its willful misconduct is not limited by this tariff. With respect to any other claim or suit, by a Customer or by any others, for damages associated with the installation, provision, termination, maintenance, repair or restoration of [long distance service], and subject to the provisions of B. through G. following, the Company's liability, if any, shall not exceed an amount equal to the initial period charge provided for under this tariff for the [long distance service] call for the period during which the call was affected or, for a DIAL-IT 900 Service Sponsor, shall not exceed an amount equal to the charge a Sponsor would pay pursuant to Section 5.1.3.B.4. following, if the Sponsor received no calls during the program day for which the DIAL-IT 900 Service was affected. This liability for damages shall be in addition to any amounts that may otherwise be due the Customer under this tariff as a credit allowance (see Credit Allowances for Interruptions, page 29).

* * * *

(8th Revised Page 26.3
Effective: August 23, 1989)

2.5. PAYMENTS AND CHARGES

2.5.10. Cancellation, Delay or Change of an Order—The regulations set forth in this section apply for canceling, delaying or changing an order for any [long distance service] components except for [long distance service] components in Section 3, Conference Services in Section 4, or Other Services in Section 5 to which monthly charges normally apply.

When an order for service is placed, a due date will be established and confirmed with the Customer. If the due date is delayed, the appropriate terms and conditions outlined in A. or B. following apply:

* * * *

(2nd Revised Page 26.4
Effective: September 13, 1985)

B. Delay of a Due Date by the Company—The Company will make every reasonable effort to assure that the [long distance service] offering ordered is furnished on the due date. However, in some cases a delay in the installation may be unavoidable. If an order is delayed beyond its due date for more than 45 cumulative calendar days and such delay is not requested or caused by the Customer, the Customer may cancel the order without penalty or payment of non-recurring charges.

C. Cancellation of an Order—A Customer may cancel an order at any time prior to the due date. An order is considered to have been cancelled when the Company receives a notification of cancellation from the Customer. Such notification may not be retroactive.

Cancellation Charge(s) will apply as follows, unless caused by Company delay as specified in B. preceding, or otherwise specified in the section applicable to the specific service:

1. When the Customer cancels an order prior to the start of plant work activity, the Service Ordering Charge relative to the activity involved will apply.

2. Installation of a service order is considered to have started when the Company begins to process a service order.

(1st Revised Page 26.5
Effective: September 13, 1985)

3. When the Customer cancels an order after plant work has started, a charge equal to the costs incurred in such installation will apply, less estimated net salvage. This charge will include the nonrecoverable cost of equipment and material ordered, provided or used, plus the nonrecoverable cost of installation and removal including the costs of engineering, labor, supervision, transportation, rights of way and other associated costs. Estimated net salvage will be based on recoverable cost of reusable equipment and material.

* * * *

(6th Revised Page 149
Effective: October 15, 1989)

6.2. REGULATIONS

6.2.4. Allocation of Usage or Charges—The Company will not allocate the usage of a Custom Network Service or the charges for such usage and is not responsible for the way the Customer may allocate usage or charges among multiple Users. . . .